Supreme Court, U. S.
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No. 80-395

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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LESLIE MINYE
Petitioner,
v.
UNIVERSITY OF MICHIGAN, REGENTS OF THE
UNIVERSITY OF MICHIGAN, EXECUTIVE COMMITTEE
OF THE SCHOOL OF DENTISTRY OF THE UNIVERSITY
OF MICHIGAN, AND SCHOOL OF DENTISTRY OF
THE UNIVERSITY OF MICHIGAN,
Respondents.

◆

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

◆

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QUESTIONS PRESENTED

I.

WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY DISMISSING PLAINTIFF'S ENTIRE COMPLAINT WITHOUT RULING ON PLAINTIFF'S DISCRIMINATION, CONSPIRACY AND BREACH OF CONTRACT CLAIMS?

II.

WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON THE UNVERIFIED CHRONOLOGY OF EVENTS WITH UNVERIFIED SUPPORTING DOCUMENTS PRESENTED IN THE SUPPLEMENTAL BRIEFS WITHOUT ACCORDING PLAINTIFF A HEARING REQUIRED BY LAW?

III.

WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT PLAINTIFF WAS NOT DENIED DUE PROCESS UNDER THE FOURTEENTH AMENDMENT, EVEN IF *BOARD OF CURATORS VS. HOROWITZ*, 435 U.S. 78, 98 S CT 948; 55 L ED 2d 124 (1978) WAS PROPERLY APPLIED RETROSPECTIVELY?

IV.

WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON NO GENUINE ISSUE OF MATERIAL FACT BY FINDING THAT DEFENDANTS DID NOT DISMISS PLAINTIFF IN AN ARBITRARY AND CAPRICIOUS MANNER WHEN ALLEGATIONS OF BAD FAITH ARE CONTAINED IN THE COMPLAINT?

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Leslie Minye, petitioner, respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered in this cause on June 17, 1980.

OPINION AND ORDER BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not yet been published and petitioner is without knowledge as to whether an opinion will be published.

The Order of the Court of Appeals for the Sixth Circuit dated June 17, 1980, and issued as Mandate on July 9, 1980, affirming the Judgment of the Eastern District Court of Michigan, Southern Division, is printed as Appendix D below.

JURISDICTION

The Order of the Court of Appeals for the Sixth Circuit was entered on June 17, 1980. See Appendix D below. Petitioner did not petition for rehearing or for rehearing En Banc.

Jurisdiction is conferred upon this Court by 28 USC § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

The Fourteenth Amendment to the United States Constitution provides in part:

> "Nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

Petitioner filed a Complaint and Demand for Jury in the United States District Court for the Eastern District of Michigan, Southern Division, on October 6, 1977, naming respondents as Defendants. In his Complaint, Mr. Minye stated that he was born in Budapest, Hungary in 1948, emigrated to the United States in 1966, became a United States citizen in 1971, graduated from the University of Michigan with a Bachelor of Arts degree in 1972 and was admitted to the University of Michigan Dental School commencing with the class of September, 1972. (Complaint Paragraphs 6-10, (8a))* His Complaint alleged that he was dismissed from the University of Michigan School of Dentistry three months before graduation although he had maintained over the required 2.0 gradepoint average and has easily passed the required two part National Board Examination thereby constituting a breach of contract by Respondent, that he was deprived of rights, privileges, and immunities conferred to him under the Constitution and laws of the United States in violation of 42 USC 1983, that certain members of the faculty, individually and in concert, conspired to deprive Mr. Minye of his Constitutional, Statutory and contractual rights by causing him to receive non-passing grades in certain clinical courses, and that the acts of the Defendants deprived him of his opportunity to receive a Degree of Dental Surgery without affording him any basic precedent or antecedent procedural safeguards under the Fourteenth Amendment. (Complaint)

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* The "T" in parentheses refers to transcript of Trial Court proceedings and the "a" refers to pages in the Joint Appendix filed on appeal to the Sixth Circuit Court of Appeals.

Respondents' Answer to Complaint with Affirmative Defenses and attachments was filed on December 1, 1977 wherein Respondents denied most of the substantive allegations of Plaintiff but specifically admitted that a 29 year old third semester dental student cannot find easy acceptance in other dental schools. (Respondents' Answer, Paragraph 20 (28a)) In addition, an exhibit was attached to Respondents' Answer which is a letter admitted by Respondents to have been sent to other dental schools explaining why Petitioner was dismissed from the University of Michigan Dental School which not only states that he was dismissed at the end of the first term of his senior year because of E grades in Clinical Operative Dentistry and Periodontics, but also, that Mr. Minye's background makes it difficult for him to communicate effectively with people which to a significant degree is responsible for many of his academic problems. (Respondents' Answer, Exhibit B, 39a)

Petitioner and Respondents filed Interrogatories and took several depositions, including that of respondent, some of his instructors and administrators.

Respondents filed a Motion to Dismiss and alternative Motion for Summary Judgment with Brief and attachments but without Affidavits. Supplements to Memorandum Brief in Support of Respondents' Motion to Dismiss with attachments were filed on September 29, 1978 and October 18, 1978 respectively. Petitioner filed an Answer in Opposition to Respondents' Motions with Brief and Affidavit with attachments (440a-446a) on November 16, 1978. (Docket entries, 4a)

The Honorable James P. Churchill, United States District Judge, held an oral argument hearing on December 22, 1978 (489a-523a) wherein the Court specifically recognized Mr. Minye's Complaint of arbitrary and capricious withholding of his D.D.S. Degree (Tr. 494a), recognized that the Court could grant relief if Petitioner's claim of discrimination on the basis of national origin was established (Tr. 498a-500a), recognized that Respondents' Motion was raising the issue of whether there is a genuine issue of fact on the issues so raised (Tr. 501a), recognized that Petitioner was entitled to be given the opportunity to have a hearing before the Executive Committee pursuant to dismissal and counsel for Respondents specifically acknowledged that such a Hearing requirement exists. (Tr. 502a)

Judge Churchill was also informed by counsel for Respondents that there was a hearing after each dismissal from the institution and after Petitioner's failure of two courses in the summer of 1977 and that he could produce a letter from Dean Doerr evidencing that Petitioner did have such an opportunity (Tr. 503a-504a), and the Court stated on the record that it had not read all of the Depositions (Tr. 503a). The University attorney admitted that it is essential for Petitioner to have an opportunity to appear at a meeting of the Executive Committee where his ultimate dismissal from the University was decided (Tr. 507a). The trial judge narrowed the Motion Hearing to the issue of minimal due process requirements afforded by Respondents (Tr. 508a). The trial Court was then informed by attorney for Respondents that the opportunity for an informal hearing before the Executive Committee occurred but that Petitioner did not attend and that the Executive Committee reviewed all of his work (Tr. 580a), that the letter notified Mr. Minye of the time and place where he should appear after his ultimate dismissal (Tr. 590a), and that the Court ultimately announced that the issue before it was whether or not there is a genuine issue on the existence of an opportunity to appear at an informal hearing and was so acknowledged by counsel for respondents (Tr. 510a). Petitioner cites the foregoing factual statement of the Hearing dialogue for the reason that no such letter exists, or ever did exist, and no such notice and opportunity were given to Petitioner in August of 1977 before or after the Executive Committee determined that Petitioner should be dismissed and not allowed to return to the Dental School.

The Court at the December 22, 1978 hearing pursuant to Respondents' Motion to Dismiss and alternative Motion for Summary Judgment again acknowledged that it had not read the Depositions in conjunction with Petitioner's Brief in response to Respondents' Motion. (Tr. 513a) The Court was predisposed to grant Respondents' Motion for Summary Judgment and did not request supplemental briefs or arguments regarding the issue of arbitrary and capricious dismissal, or breach of contract but rather announced that he was not going to be the first judge in the United States to start deciding whether a student passes a course or not. (Tr. 521a) Instead, the Court isolated the issue of whether or not Petitioner had an opportunity to be heard and allowed the parties' respective counsel to prepare a chronological sequence leading up to the ultimate dismissal of Petitioner. (Tr. 522a)

Thereafter, the course of proceedings involved the filing by Respondents of a Brief Regarding the Due Process Issue with unverified attachments which apparently were filed directly with the Court and which do not appear on the docket entry sheet. (Docket entries, 4a) Petitioner filed a Supplemental Brief in Response to Respondents' Motion for Dismissal on January 10, 1979 and a Reply to Respondents' Brief Regarding Due Process was filed on February 13, 1979 by Plaintiff. (Docket entries, 4a)

On April 5, 1979, Honorable James P. Churchill rendered a memorandum opinion consisting of one page (576a) with no findings of fact wherein the Court specifically refers to a review of the chronology of events with supporting documents presented in the Supplemental Briefs supplied by Respondents and Petitioner as the basis for granting Respondents' Motion for Summary Judgment and determined that Petitioner was not denied due process under the Fourteenth Amendment and that the Respondents did not dismiss him in an arbitrary and capricious manner and that the dismissal procedure followed satisfied the requirements of *Board of Curators* vs. *Horowitz*, 435 US 78; 98 S Ct 948; 55 L Ed 2d 124 (1978) (567a). The Court entered its own Order Granting Respondents' Motion for Summary Judgment based on the reasons stated on the record in open Court on December 22, 1978 and set forth in its Memorandum Opinion (577a) and rendered its Judgment accordingly, which was filed April 5, 1979 (578a).

On May 2, 1979, Petitioner filed a Notice of Appeal (579a), Proof of Service and Appeal Bond. (Docket entries, 4a-5a)

Because the District Court Judge did not make any findings of fact in his Memorandum Opinion, Judgment and Order, but rather only announced that as a matter of law Respondents were entitled to an Order granting Respondents' Motion for Summary Judgment based on a review of the chronology of events exhibited in Respondents' Supplemental Brief and, because Petitioner's assertion on appeal is that there are many genuine issues of material fact precluding the action of the District Judge, a statement of facts relevant to the issues presented for review are substantially disputed by the parties and cannot be represented to this Honorable Court as an accurate rendition of facts. Petitioner can only stipulate that the undisputed facts are that Mr. Minye was dismissed on January 7, 1977 for the first time without a hearing. On January 21, 1977 he attended an Executive Committee Meeting but did not participate in the discussion for fear of being disrespectful. On February 22, 1977 Petitioner wrote a letter requesting readmission and personal appearance but it was not granted. On February 25, 1977 the Executive Committee met and considered the letter from Petitioner but took no action. A telephone call from Dr. William Cash, assistant to the University President, regarding the dismissal of Mr. Minye was discussed by Dr. Doerr at this Meeting. (Doerr Depn. 241a)

On April 8, 1977, the Executive Committee met and voted to readmit Mr. Miyne to start the summer term. In June of 1977 Petitioner was readmitted to Summer Term in Clinical Operative Dentistry and Periodontics (Doerr Depn., 242a) where he encountered the same instructors who had originally failed him.

Petitioner's experience during the summer of 1977 led him to believe that untrue information was being submitted by the chairman of the Operative Dentistry and Clinical Periodontics departments which ultimately resulted in his dismissal by the Executive Committee in

January of 1977. Therefore, he wrote a letter dated July 25, 1977 to Dr. Robben W. Fleming, University President, claiming intellectual dishonesty on the part of the faculty with a design to removing him from the program, motivated by personal feelings of disfavor.

On August 23, 1977, Dean Doerr composed a letter to Petitioner dated August 23, 1977, indicating that the Executive Committee had decided that he could not return to school based on his failure to pass Operative Dentistry and Periodontic Clinic in the summer of 1977. However, the Executive Committee had not met but, rather, a telephone survey was made on August 23 and 24, 1977, (after the composition of the letter from Dean Doerr), wherein certain members of the Executive Committee away on vacation voted to dismiss Petitioner. (Koran Depn., 209a-210a; Petitioners' Ans. Ex. C, 40a)

The chronology of events submitted by Respondents' attorney in his Supplemental Brief Re: Due Process Issue are subject to dispute and the facts as to the arbitrary and capricious dismissal of Petitioner and the opportunity to be heard after his dismissal on August 26, 1977 are disputed, are fully discussed in the Deposition testimony and other pleadings and served as the basis for Petitioner's request for reversal in that such disputed facts are material and raise genuine issues which Petitioner contends should preclude Summary Judgment.

Petitioner was granted oral argument before a 3 member panel of the Sixth Circuit Court of Appeals heard on June 2, 1980. The Sixth Circuit Court affirmed the lower Court Summary Judgment by Order dated June 17, 1980.

REASONS FOR GRANTING THE WRIT

I.

WHEN RULING PURSUANT TO A MOTION FOR SUMMARY JUDGMENT BASED ON NO GENUINE ISSUE OF MATERIAL FACT, RULE 56(d), FEDERAL RULES OF CIVIL PROCEDURE, THE TRIAL JUDGE IS REQUIRED TO EXAMINE THE PLEADINGS AND THE EVIDENCE BEFORE IT, ASCERTAIN WHAT MATERIAL FACTS EXIST AND RENDER ONLY A PARTIAL SUMMARY JUDGMENT IF ALL CAUSES OF ACTION STATED IN THE COMPLAINT ARE NOT ADJUDICATED.

At the hearing held on December 22, 1978 before the Honorable James P. Churchill pursuant to Respondents' Motion for Dismissal under Rule 12(B) or in the alternative, a Motion for Summary Judgment based on no genuine issue of material fact, Rule 56, the Court was aware of the identified claims alleged in Petitioner's Complaint. His Complaint contained allegations that 1.) He was discriminated against on the basis of national origin, 2.) Arbitrarily and capriciously dismissed from the University, 3.) Was denied the protection of the Fourteenth Amendment due process procedures after his ultimate dismissal in August 1977, 4.) His contract with the University was breached, 5.) Certain members of the faculty acted in concert in conspiring to assure his ultimate dismissal. In fact, the Court at Page 12 (500a) of the Hearing transcript is told by Mr. Davis, attorney for the Respondents, that Petitioner has stated a cause of action in his Complaint and the Court and Mr. Davis agreed that the national origin discrimination allegation gave rise to a question of fact, (Tr. 12 (500a)) In fact, the Court specifically refers to the lists of grievances "including some things that bring him close to suspect category, foreign-born, speech, that sort of thing." (Tr. 499a)

The hearing was severely limited by the eventual question and answer session which resulted in the Court never again addressing the national-origin discrimination claim of Petitioner or the breach of contract claims. Instead, a brief discussion of Petitioner's arbitrary and capricious dismissal took place which also resulted in the Court admitting that it had not read all of the depositions (Tr. 503a) and perhaps should not have been expected to read all of the depositions unless "You got one little deposition that's fine." (Tr. 513a) The Court went on to state "I am not at the moment asking you for further briefs or argument or supplement about whether anything was arbitrary and capricous or not" and went on to state "I may very well grant your Motion for Summary Judgment," announcing to counsel that he was not going to be the first judge in the United States to start deciding whether somebody passes a course or not. (Tr. 521a) A brief analysis of the Memorandum Opinion of the Court issued April 4, 1979, further reflects and corroborates that Judge Churchill had not considered Petitioner's Brief in Reply to Respondents' Motion which contained evidence of arbitrary and capricous dismissal but, rather, predicated his opinion on the chronology of events supplied by the attorney for the Respondents. (576a)

Petitioner's Complaint stated a cause of action under 42 USC 1983 and 42 USC 1985 alleging deprivation of civil rights and conspiracy to interfere with his civil rights and further alleging deprivation of rights conferred pursuant to the United States Constitution, Amendments I, V and XIV. (Complaint, 7a) The Court not having disposed of the claimed violations of 42 USC 1983 and 1985, not having disposed of Petitioner's claim that he was denied equal protection under the laws of the United States Constitution because of national-origin discrimination and not having disposed of the pendent issue of breach of contract, the Court should not have dismissed the entire Complaint of Petitioner, but, rather, should have appropriately rendered a partial summary judgment after stating the facts as found by the Court and determining that as a matter of law respondents were entitled to a partial summary judgment, if any. None of this occurred.

Aside from the authority provided in Rule 56(d), Federal Rules of Civil Procedure, authority for rendition of a partial summary judgment is found in 73 Am Jur 2d 41 citing *Sumitomo Shoji New York, Inc.* vs. *Isbrandtsen Company*, 23 App Div 2d 752, 258 NYS 2d 1020 and *Gaylord* v. *Gaylord*, 271 App Div 1045, 68 NYS 2d 513.

Although not specifically set forth in Petitioner's Complaint, the allegations contained in his Complaint state a cause of action under the Michigan Elliot-Larson Civil Rights Act effective March 31, 1977, cited as MCLA 37.2401, Article IV. That act defined civil rights and prohibits discriminatory practices, policies and customs based upon, inter alia, national origin. It also prohibits concerted effort in the form of conspiracy by one or more persons against a person because he has opposed a violation of the Act. Judge Churchill clearly pointed out and defense counsel clearly agreed that the allegations in Paragraph 15 and 16 of Petitioner's Complaint stated a cause of action based on national origin. (Tr. 499a-500a)

The Deposition of Mr. Minye is replete with examples which are tanamount to conspiracy to retaliate against Mr. Minye for his Complaint to the University President regarding prejudice. An extreme example of the intense prejudice of Dr. Kahler, one of the Petitioner's Clinical Operative Dentistry instructors, occurred during the summer of 1977 when Dr. Kahler determined that he would administer certain written didactic examinations to Mr. Minye after which he failed him on each examination, despite the fact that his answers were almost exactly as written in the textbook from which Mr. Minye had learned the subject matter. (Minye Affidavit, 444a-488a) When there is a deliberate failure of three written examinations and the answers circled by Dr. Kahler as wrong directly corresponded with the textbook, then judicial review is appropriate and certainly raises a question of fact as to whether conspiracy or retaliation actually occurred. *Gaspar* vs. *Bruton,* 513 F 2d 843 (1975) is such a case arising out of 42 USCA 1983 violations alleged by a nurse against a vocational-technical school. The *Gaspar* Court recognized that where there is a clear showing that the officials have acted arbitrarily or have abused the discretionary authority vested in them, then judicial review is authorized. *Gaspar,* supra, at 850 citing 39 ALR 1019; *Foley* vs. *Bennedict, et al,* 122 Tex. 193, 55 SW 2d 805 (1932); Anno. 86 ALR 484.

The question must be asked: Why did the trial court not dispose of all issues recognized by the Court and identified in the Petitioner's Complaint before rendering final summary judgment?

Petitioner was not afforded the full use of judicial review and procedures provided by law and Court rule.

II.

ACCORDING TO THE TRIAL JUDGE'S MEMORANDUM OPINION, THE GRANTING OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT WAS BASED ON THE UNVERIFIED CHRONOLOGY OF EVENTS GLEANED FROM UNVERIFIED SUPPORTING DOCUMENTS PRESENTED IN RESPONDENTS' SUPPLEMENTAL BRIEF, THUS, THE SUMMARY JUDGMENT WAS RENDERED BASED ON UNVERIFIED, INADMISIBLE HEARSAY EXHIBITS WITHOUT ACCORDING PETITIONER A HEARING ON THE CRITICAL ISSUE OF GENUINE ISSUE OF MATERIAL FACT CONTRARY TO LAW.

After the December 22, 1978 hearing on Respondents' Motion for Summary Judgment, the trial Judge took the matter under advisement and instructed both counsel to supplement their briefs regarding the chronology of events leading to the Respondents' actions after ultimate dismissal of Petitioner. He foreclosed any further arguments, submission of evidence or briefs regarding Petitioner's claim of arbitrary and capricious evaluation, national-origin discrimination in violation of Amendment V and XIV and breach of contract.

Counsel for Respondents then submitted Respondents' Brief Re: Due Process Issue serving Petitioner's counsel with a copy of that Brief on February 6, 1979, although the lower Court docket entries do not indicate that such a Brief Re: Due Process Issue was ever filed in the District Court.

Respondent's Brief Re: Due Prodcess Issue was simply an annotated chronology of events compiled by the attorney for Respondents, stating the date, the event, and commentary by the attorney and an exhibit number and four vertical columns. Commentary of the attorney regarding alleged facts are grossly in dispute. Attached to Respondents' Brief Re: Due Process Issue were 30 exhibits, most of which were incomplete on their face, some of which were unsigned, and most of which were unverified, unauthenticated, not certified and otherwise absolutely hearsay and inadmissible as evidence.

Very important language in the Federal Business Records Act. 28 USC 1732 and Rule 1005, Federal Rules of Evidence, requires that reproduced documents be *satisfactorily identified.* In fact, the United States Supreme Court has specifically addressed admission of documentation as evidence under 28 USC 1732 and Rule 1005 Federal Rules of Evidence. *Adickes* vs. *S.H. Kress & Company,* 398 US 144, 159; 90 S Ct 1598, 26 L Ed 2d 142 (1970) was a case in which unsupported statements were held to be precluded from consideration pursuant to a Motion for Summary Judgment.

A case directly on point arising out of the Ninth Circuit Court of Appeals is *United States vs. Dibble,* 429 F 2d 568 wherein the authentication requirement for documentation was not satisfied merely by attaching the documents to an Affidavit offered on Motion for Summary Judgment. See Moore on Federal Practice 56.11 [1.-8] and cases cited therein. In the case of Petitioner herein, not even an Affidavit was offered in support of the unverified attached documents.

After receiving such scanty, unverified documentation from Respondents' attorney, the trial Court should have immediately scheduled an evidentiary hearing. When questions of ill will, intention and bad faith have been raised, the Court is not authorized to render a Summary Judgment based on no genuine issue of material fact until an evidentiary hearing is held. The United States Court of Appeals, Sixth Circuit, in the case of *Robert Willets vs. Ford Motor Company and United Auto Workers of America, Local 898,* 583 F2d 852 involved an action brought by a former employee of Ford Motor Company for discharging him in violation of collective bargaining agreements and against the union for alleged failure to represent him fairly with respect to grievances concerning his discharge. Although the granting of Summary Judgment for Respondents by Judge Philip Pratt, Eastern District of Michigan, was upheld for the reason that the Plaintiff had not exhausted his union remedies, the Sixth Circuit Court of Appeals was explicit in holding that entry of Summary Judgment was improper where the District Court was required to hold an evidentiary hearing and then resolved disputed issues of fact. Judge Pratt held such a hearing but even then the Court of Appeals determined that he inappropriately granted the Summary Judgment because he attempted to resolve disputed issues of fact as opposed to determining whether they existed. No such hearing was afforded Petitioner.

The inadequacy of the record and the faulty basis upon which the Motion for Summary Judgment was granted clearly mandate a reversal, at least so that an evidentiary hearing can be afforded Petitioner in order to satisfy the Court that there either are or are not genuine issues of material fact.

III.

THE TRIAL JUDGE AND COURT OF APPEALS, SIXTH CIRCUIT, FAILED TO CONSIDER THE FACTS OF PETITIONER'S CASE IN VIEW OF BOARD OF CURATORS VS . HOROWITZ, 435 US 78; 98 S Ct 948; 55 L Ed 2d 124 (1978) and GREENHILL vs. BAILEY, 519 F 2d 5 (Ca 8 1975) IN THAT PETITIONER WAS NOT EVEN AFFORDED MINIMAL DUE PROCESS AND THE STIGMATIZING EFFECT OF RESPONDENTS' LETTER TO OTHER DENTAL SCHOOLS REMOVES THE CASE FROM THE TYPICAL INSTANCE OF ACADEMIC DISMISSAL AND CALLS FOR GREATER PROCEDURAL PROTECTION.

Petitioner was dismissed for the first time from the University of Michigan School of Dentistry in January of 1977 for failure of clinical courses, Periodontics and Operative Dentistry. Despite Respondents' contentions, he was not dismissed in 1973, but rather, was required to repeat Oral Pathology 518 after being guaranteed readmission in the winter of 1974. He was readmitted and received a B grade. (45a-56a; 542a) The facts in this case are particularly crucial in that the Order of the Sixth Circuit Court of Appeals (Appendix D) erroneously recites that Mr. Minye was actually dismissed from the dental school three times and twice readmitted and that each time on readmission, he failed *two* vital clinical courses. Failure of two vital clinical courses did not occur on each readmission. It only occurred on one readmission; therefore, it is clear that the Sixth Circuit Court of Appeals was unaware of the undisputed record of Petitioner's dental school career.

After the January, 1977, dismissal, Petitioner wrote a letter to the Executive Committee requesting reconsideration but the Committee reaffirmed its position. Petitioner did not participate in the discussions out of fear of being disrespectful. (Exhibit 23, pg. 1 (562a, 569a))

Thereafter, Petitioner wrote a letter to President Flemming regarding his dismissal from school and the letter was referred to Dr. William Cash who contacted Dean Doerr of the School of Dentistry. (Doerr Depn., 241a) Mysteriously, on April 8, 1977 it is undisputed that a meeting of the Executive Committee took place wherein it voted to readmit Mr. Minye. The minutes of that Executive Committee meeting do not indicate any status other than as a regular student. (Doerr Depn., 242a-243a)

The undisputed facts are that, of 150 students in his class, only Petitioner was subjected to re-evaluation by written examination in Operative Dentistry without the benefit of refresher courses or additional tutelage, even though he had passed all the required written and clinical examinations. Three examinations were given by Dr. Kahler and Dr. Pape. (Kahler Depn., 376a-378a) After completing the examinations he was told that he failed all three of the examinations given to him in the summer of 1977. (Affidavit of Petitioner 444a-446a)

As previously pointed out, several of the answers that were marked wrong by Dr. Kahler were in fact correct according to the textbook used in the teaching of dentistry. (Petitioner's Affidavit, 444a-446a) This is only one example but a prime example of the arbitrary and capricious nature of the evaluation process during the summer of 1977 and certainly raises a question as to the conspiracy or retaliation by certain members of the faculty and raises further questions about due process afforded Petitioner.

During the course of the summer of 1977, Petitioner was subjected to over 50 identifiable situations, treated hereafter, which virtually assured, that, no matter what Petitioner did during the summer of 1977, he was going to fail the repeated courses in Operative Dentistry and Periodontics.

Petitioner was given no opportunity, no notice and summarily dismissed by a telephone poll of the voting members of the Executive Committee on August 23 and 24, 1977. (Doerr Depn., 217a-219a)

Thus, after having been readmitted to repeat two clinical courses during the summer of 1977, Petitioner failed three written examinations, failed both clinical courses, the final grades for the courses were conveyed to the Executive Committee which met by telephone on August 23 and 24, 1977 and was summarily dismissed from the program without recourse. No review procedure was afforded.

Contrary to the representations by the University attorney to Judge Churchill on December 22, 1978, when pressed for hard evidence that Petitioner had an opportunity to appeal the ultimate dismissal, there is no hard evidence and it never was produced for Judge Churchill as requested. (December 22 Tr., 507a-510a)

The case of *Board of Curators vs. Horowitz*, 435 US 78, 98 S Ct, 948, 55 L Ed 124 (1978) was predicated upon facts dissimilar to those of Petitioner. In *Horowitz*, the academic dismissal of Ms. Horowitz at the University of Missouri-Kansas City Medical School was preceded by several due process safeguards before and after her ultimate dismissal. Charlotte Horowitz was afforded due process safe-guards in that 1.) A counsel of evaluation composed of a faculty-student body existed to recommend various actions, including probation and dismissals; 2.) Those recommendations were reviewed by the Faculty Coordinating Committee; 3.) Ultimate approval was given by the Dean; 4.) An appeal process of the ultimate decision to dismiss Charlotte Horowitz was granted; 5.) Ms. Horowitz was allowed to demonstrate her proficiency to seven *independent* practicing physicians; 6.) And after the reports from the independent practicing physicians were received, the council then reviewed their prior decision; 7.) The council then reviewed another post-dismissal surgery rotation; 8.) And finally Ms. Horowitz was allowed to appeal to the Provost who sustained the decision to dismiss her. The *Horowitz* Court did not indicate that such broad procedural due process as was afforded Ms. Horowitz is required, however, the *Horowitz* facts and the Court in the case of *Tomanio vs. Board of Regents of University of the State of New York*, 603 F 2d 255, (1979) clearly indicate that "impartial fact finders" are required to satisfy minimal due process.

Petitioner recognizes that the *Horowitz* Court distinguished between requirements of due process in the case of disciplinary actions as opposed to academic dismissals. However, the *Horowitz* Court cited the case of *Greenhill vs. Bailey*, 519 F 2d 5 (Ca 8 1975) which indicated that when a dismissed student is stigmatized by circulation of the reasons for his academic dismissal, especially as they relate to deficiencies in the student's intellectual ability, then greater procedural protections are required. *Board of Curators vs. Horowitz, supra*, Footnote 5.

Here, Petitioner was not only denied the due process afforded Ms. Horowitz, but was grossly stigmatized by the University of Michigan School of Dentistry after his ultimate dismissal. The School of Dentistry took it upon itself to explain to other dental schools why Petitioner was dismissed from the University of Michigan Dental School by virtue of a letter it disseminated and which Respondents attached to the Answer to Complaint and designated as Exhibit B. (1 Pg., 39a) In that letter, composed by Robert E. Doerr, Associate Dean, Respondents themselves corroborated to a certain degree that Petitioner was not dismissed on purely academic ground, but that the University and apparently his immediate instructors understood that Petitioner's background, (a refugee from Communist Hungary) interfered with his relations with his instructors. The third full paragraph of the letter attached to Respondents' Answer designated as Exhibit B is as follows:

> "I feel that Mr. Minye's background makes it difficult for him to communicate effectively with people. Furthermore, this lack of communication is to a significant degree responsible for many of his academic problems. He is a complex young man, with many personal concerns regarding his family. To what extent his different personality influences his clinical evaluation I am not sure, but it is my opinion the potential exists." (Respondents' Answer, Exhibit B, 1 Pg., 39a)

The Associate Dean of the University of Michigan School of Dentistry specifically states that Petitioner's background "is to a significant degree responsible for many of his academic problems."

The *Greenhill* Court was of the opinion that "the publicization of an alleged deficiency in the student's intellectual ability removed the case from the typical instance of academic dismissal and calls for greater procedural protections." *Board of Curators vs. Horowitz, supra,* Footnote 5. Is not such a stigmatizing letter as was written by Associate Dean Doerr regarding Petitioner one that removes the case from the typical instance of dismissal and calls for some greater form of procedural protection upon his ultimate dismissal after the summer of 1977? Does it not raise a substantial question of fact as to whether Petitioner's national origin and Amendment V and XIV claims are true, or, at least, worthy of a trial?

IV.

THE TRIAL COURT'S REFUSAL TO REVIEW THE DEPOSITIONS, AFFIDAVITS AND PLEADINGS WHEREIN HE COULD HAVE DISCOVERED OVER 50 IDENTIFIABLE ISSUES OF FACT RESULTED IN A DENIAL OF JUSTICE AND A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS TO THE EXTENT THAT SUMMARY JUDGMENT BASED ON NO GENUINE ISSUE OF MATERIAL FACT WAS TOTALLY ERRONEOUS.

Petitioner's Complaint clearly illustrated allegations of ill will or bad motive, bad faith, arbitrariness, capriciousness and discrimination. The pleadings, Affidavits and Depositions substantiate those allegations.

In such cases, the United States Supreme Court in the *Horowitz* case, specifically recognized that such circumstances are reviewable if "shown to be clearly arbitrary or capricious," citing *Mahavongsanan vs. Hall*, 529 F 2d 448 (Ca 5 1976) at 449 and *Gaspar vs Bruton*, 513 F 2d 843, Ca 10 (1975) at 850. *Horowitz, supra*, at 956. The Memorandum Opinion of Judge Churchill (Appendix A) is a one-page document consisting of four paragraphs with absolutely no findings of fact. The two concepts of violation of 14th Amendment rights vis-a-vis arbitrary or capricious dismissal are separate and distinct. In order for Judge Churchill to determine that the claims of arbitrary dismissal or bad faith conspiracy or retaliation by Respondents against Petitioner leading up to his ultimate dismissal are fairly disputed precluding Summary Judgment, he must either conduct a tedious comparative analysis of the deposition testimony, exhibits and affidavits or an evidentiary hearing. If the lower Court was not inclined to review all of the voluminous evidence elicited by Petitioner contained in the Depositions, then an evidentiary hearing to determine whether or not a genuine issue of material fact existed was necessary. See *Willits vs. Ford Motor Company*, 583 F 2d 852 (1978)

Petitioner's Appeal Brief in the Sixth Circuit Court of Appeals outlines over 50 specifically identifiable genuine issues of fact too lengthy to be included herein. Any one of those itemized issues of fact was sufficient to preclude a Final Summary Judgment.

The contradictions between not only the deposition testimony of Petitioner and his instructors, but between the instructors themselves, are instantly recognizable as genuine issues of material fact precluding Summary Judgment. The proper approach of Judge Churchill would have been to review the Deposition testimony, or in the alternative, hold a hearing with representative witnesses who could satisfy the Court that either a genuine issue of material fact existed or did not exist. None of this occurred.

> "As the Supreme Court observed in *Adickes vs. Kress & Company*, the Advisory Committee on the 1963 Amendments to Rule 56 expressly rejected the idea that subdivision (a) altered the

> ordinary standards of proof in a Motion for Summary Judgment:
>
> 'Where the evidentiary matter in support of the Motion does not establish the absence of a genuine issue, Summary Judgment must be denied *even if no opposing evidentiary matter is presented.'*
>
> 398 US at 160, 90 S Ct at 1610 (emphasis in original), quoting Advisory Committee notes on 1963 to Rule 56." *Felix vs. Young*, 536 F2d 1126 at 1135 (1976). Also see *Poller vs. Columbia Broadcasting System*, 368 US 464, 82 S Ct 486 (1961).

Evidentiary matter presented by Respondents in support of the Motion was wholly deficient. Petitioner's evidence of numerous instances of genuine issues of fact, and depositional evidentiary matter opposing the Motion properly required the Trial Court to deny Respondent's Motion for Summary Judgment.

RELIEF REQUESTED

For the reasons above set forth, Petitioner respectfully prays this Court issue its Writ of Certiorari in this case to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Dated: August 6, 1980

APPENDIX A

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed April 5, 1979)

(Leslie Minye, Plaintiff, vs University of Michigan, et al., Defendants. Civil No. 77-72421)

After oral arguments on December 22, 1978, the Court took under advisement, and requested supplemental briefs on, the defendants' motion to dismiss and/or for summary judgment. Supplemental briefs have been received and considered.

Prior to taking the motion under advisement on December 22, the Court made it clear on the record that unless the plaintiff presented some evidence that the defendants were arbitrary and capricious in their dismissal of the plaintiff from dental school, summary judgment would be granted in favor of the defendants.

It is clear from reviewing the chronology of events with supporting documents presented in the supplemental briefs that the plaintiff was not denied due process under the Fourteenth Amendment and the defendants did not dismiss him in an arbitrary or capricious manner. The procedure for dismissal followed in this case satisfies the requirements of *Board of Curators v. Horowitz,* 435 U.S. 78, 98 S. Ct. 948, 55 L.Ed.2d 124 (1978).

An order shall issue granting the defendants' motion for summary judgment.

/s/ JAMES P. CHURCHILL
UNITED STATES DISTRICT JUDGE

Dated: April 4, 1979

APPENDIX B

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(United States District Court
Eastern District of Michigan
Southern Division)

(Leslie Minye, Plaintiff, vs University of Michigan, et al., Defendants. Civil No. 77-72421)

At a session of said court held in the Federal Building and U.S. Courthouse, Detroit, Michigan, on April 4, 1979.

Present: HONORABLE JAMES P. CHURCHILL
United States District Judge

For the reasons stated on the record in open court on December 22, 1978, and set forth in a Memorandum Opinion bearing this date, IT IS ORDERED that the defendants' motion for summary judgment be and hereby is GRANTED.

IT IS SO ORDERED.

Let judgment enter accordingly.

/s/ JAMES P. CHURCHILL
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT hereon and accompanying MEMORANDUM OPINION and JUDGMENT were served upon David H. Fried, Esq., Craig, Fried & Heidt, 1710 Buhl Building, Detroit, MI 48226; Peter A Davis, Esq., Davis and Fajen, 320 North Main Street, Suite 400, Ann Arbor, MI 48104; and Roderick K. Daane, Esq., General Counsel, University of Michigan, 4020 Administration Building, Ann Arbor, MI 48109; by depositing same in the United States mail at Detroit, Michigan, on April 5, 1979.

/s/ Diane J. Phillips
Secretary to Judge Churchill

APPENDIX C

JUDGMENT

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed April 5, 1979)

Leslie Minye, Plaintiff, vs University of Michigan, et al., Defendants. Civil No. 77-72421)

The Court having entered an Order Granting Defendants' Motion for Summary Judgment based upon its review of the defendants' motion for summary judgment and upon its review of the file and having determined that the movants are entitled to the relief sought;

IT IS ORDERED AND ADJUDGED that the action be dismissed in accordance with the Memorandum Opinion and Order filed on April 5, 1979.

Dated at Detroit, Michigan, this 5th day of April, 1979.

ARTHUR J. MORSCH, JR.
ACTING CLERK OF THE COURT

By /s/ Lillian Brooks
Deputy Clerk

Approved:

/s/ James P. Churchill
United States District Judge

APPENDIX D

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed June 17, 1980)

(Leslie Minye, Plaintiff-Appellant vs University of Michigan, et al, Defendants-Appellees. 79-1325)

Before: EDWARDS, Chief Judge, WEICK and JONES, Circuit Judges.

Appellant Minye appeals from Judge Churchill's entry of summary judgment in favor of the University of Michigan after extensive discovery and depositions before him in Minye's 42 U.S.C. § 1983 suit. Minye's essential claims are that the University of Michigan, after admitting him to its dental school dismissed him in violation of his equal protection and due process rights.

Minye claims that his status as a refugee from Hungary provoked prejudice against him on the part of the dental school faculty. He did not, however, present evidence to Judge Churchill which served to persuade him or us to this effect.

The record clearly demonstrates that the University of Michigan Dental School gave him three separate chances before finally dismissing him. Minye was actually dismissed from the dental school three times and twice readmitted. Each time on readmission, he failed two vital clinical courses.

On this record, we are unable to find that the defendant violated either equal protection or due process or that the District Judge committed any error in granting summary judgment for the defendant.

The judgment of the District Court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

ISSUED AS MANDATE: July 9, 1980
COSTS: NONE

Supreme Court, U. S.
FILED

NOV 19 1980

MICHAEL RODAK, JR., CLERK

No. 80-395

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LESLIE MINYE
Petitioner,
v.
UNIVERSITY OF MICHIGAN, REGENTS OF THE UNIVERSITY OF MICHIGAN, EXECUTIVE COMMITTEE OF THE SCHOOL OF DENTISTRY OF THE UNIVERSITY OF MICHIGAN, AND SCHOOL OF DENTISTRY OF THE UNIVERSIY OF MICHIGAN,
Respondents.

SUPPLEMENTAL BRIEF PURSUANT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

I.

WHETHER "EXCEPTIONAL CIRCUMSTANCES" CONSTITUTE ADEQUATE REASON TO RELIEVE PETITIONER FROM THE FINAL SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS ENTERED ON APRIL 5, 1979, BY UNITED STATES DISTRICT JUDGE JAMES P. CHURCHILL?

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No. 80-395

IN THE

Supreme Court of the United States

◆

OCTOBER TERM, 1980

◆

LESLIE MINYE
Petitioner,
v.
UNIVERSITY OF MICHIGAN, REGENTS OF THE UNIVERSITY OF MICHIGAN, EXECUTIVE COMMITTEE OF THE SCHOOL OF DENTISTRY OF THE UNIVERSITY OF MICHIGAN, AND SCHOOL OF DENTISTRY OF THE UNIVERSIY OF MICHIGAN,
Respondents.

◆

SUPPLEMENTAL BRIEF PURSUANT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

◆

Leslie Minye, Petitioner, respectfully prays that a Writ of Certiorari or an Order granting relief from Summary Judgment in favor of Respondents issue to review the order of the United States Court of Appeals for the Sixth Circuit entered in this cause on June 17, 1980, or to reopen the case for further proceedings pursuant to Defendants' Motion for Summary Judgment before Judge James P. Churchill.

JURISDICTION

Jurisdiction is conferred upon this Court by 28 USC Section 1254 and Rule 22.6, Rules of the Supreme Court of the United States.

STATEMENT OF FACTS

Petitioner, Leslie Minye, has heretofore filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit docketed in this Court on September 11, 1980. Thereafter, Respondents untimely filed a Brief in Opposition to Petition for Writ of Certiorari. Statements of facts by both Petitioner and Respondents appear therein. Petitioner asserts the following facts to establish exceptional circumstances providing a basis for relief pursuant to Federal Rules of Civil Procedure 60(b), (1), (2), and (6).

Petitioner's trial attorney, Mr. David Fried, in a grossly negligent manner, failed to properly prosecute Mr. Minye's cause at the trial level in that (1) he failed to recognize a probable conflict of interest which arose or, the probable appearance of impropriety, when he retained an attorney to write Plaintiff's Brief and Reply to Defendants' Motion for Summary Judgment in that the retained attorney was a co-author of a segment of a lawyers manual on the law of discovery with Mr. Davis, attorney for Defendants and Respondents herein; (2) he failed to raise a genuine issue of material fact by refusing or neglecting to attach an Affidavit from Dr. Richard P. Cohan, after having retained Dr. Cohan as an expert witness prior to the December 22, 1978 Motion Hearing and after having received a written critique from Dr. Cohan together with substantial review notes which should have been attached to supplemental pleadings at the trial level. See Appendix A, B and C below; (3) he failed to attach written signed statements from patients of Mr. Minye for the purposes of raising a genuine issue of material fact, See Appendix D, E, F and G below; (4) he failed to attach pleadings, affidavits or seek discovery to establish a genuine issue of material fact based on the information provided to him by Mr. Minye that homosexual advances by a faculty instructor had been made and refused, probably causing the basis for his failure of a clinical dental course and providing the basis for discrimination, arbitrary and capricious or conspiratorial dismissal; (5) he failed to object to thirty (30) unverified exhibits attached to Defendants' Supplemental Brief; (6) he failed to bring to the Court's attention that Mr. Davis, Respondents' attorney, had not produced the "hard evidence" that Mr. Minye was indeed afforded due process after Mr. Davis represented to the Court that such evidence existed; (7) he willfully destroyed and discarded documents provided by Mr. Minye to Mr. Fried which reflected faculty evaluations by two instructors which were favorable which could have raised a genuine issue; (8) he failed to request an evidentiary hearing provided by law after due notice of Defendants' Motion for Summary Judgment and failed to pursue any further discovery to obtain affidavits in response thereto; (9) Mr. Fried failed to obey the directive of the trial court at the December 22, 1978 hearing requiring him to cross-reference testimony contained in the Depositions to raise a genuine issue, See Appendix H consisting of Pages 34 through 48 of the Appeal Brief filed in the U.S. Sixth Circuit Court of Appeals; (10) he failed to plead that a Summary Judgment, if any, should only be a Partial Summary Judgment in that Mr. Minye's national origin claim of discrimination and breach of contract claims were not disposed of by the trial judge; (11) he failed to plead that the allegations contained in the Complaint constituted a statement of a cause of action pursuant to the Michigan Elliott-Larsen Civil Rights Act which would have increased Defendants' burden; (12) in his Answer to the Grievance filed against him by Mr. Minye, Mr. Fried willfully misrepresented that the written statements from the patients were made a part of the file when in fact they were never filed in the trial court, grossly and falsely represented to the Attorney Grievance Commission that the Sixth Circuit Court of Appeals in Cincinnati had sustained the trial court's ruling when in fact it was not affirmed until seven months after Mr. Fried made that representation and falsely implied therein that Mr. Minye could have attended other dental schools, and exercised unconscionable tactical judgment in the face of a Motion for Summary Judgment. See Appendix I; (13) he failed to file a Motion for Reconsideration within the time allowed; (14) he failed to request specific findings of facts pursuant to the Summary Judgment; (15) he failed to take the deposition of Defendants' Assistant to the President who had advised Mr. Minye that the only relief available would be to file suit; (16) he failed to serve a subpoena duces tecum upon Defendants to obtain verified copies of University records; (17) he failed to raise the legal argument pursuant to Defendants' Motion for Summary Judgment that *Greenhill v. Bailey*, 519 F 2d 5 (CA 8 1975) required expanded due process be afforded when a stigmatizing letter such as that attached to the Answer of Defendants is sent to other Universities, See Appendix J.; (18) he failed to advise Mr. Minye that the Defendants had offered a hearing regarding dismissal after suit was filed; (19) he failed to emphasize that Plaintiff had maintained the necessary grade point average, had completed 95% of the requirements for graduation and he did not submit a copy of the National Board of Examination Certificate indicating that Mr. Minye had passed both parts and that all required clinical and written examinations were passed by Plaintiff, See Appendix K below; (20) and he failed to attach a copy of a letter from Plaintiff's employer or take his deposition in order to establish a genuine issue of material fact contradicting the negative evaluations by his instructors at the University of Michigan. See Appendix L.

Further extraordinary circumstances arose shortly after the Summary Judgment was issued. Mr. Minye obtained a letter from West Dental Laboratory, his former employer while a student indicating that Dr. Kahler, the instructor who was the alleged primary nemesis of Mr. Minye, had undoubtedly not only caused his dismissal but caused West Dental Laboratory to ask for his resignation because Dr. Kahler and associates, who themselves used West Dental Laboratory, refused to continue to use West after finding that Mr. Minye was working on prescriptions for gold and bridge assignments, some of which were done directly for Dr. Kahler without his knowledge. Previously there had been no complaints whatsoever. See Appendix M below.

As if such neglect was not enough, Mr. Minye retained the lawfirm of Durant & Durant prior to filing his Notice of Appeal on April 13, 1979. A specific retainer agreement was signed for the purposes of filing a Motion for Reconsideration of the Summary Judgment on or before April 24, 1979 for which Mr. Minye paid Three Thousand Dollars ($3,000); however, in contravention of the Agreement, the lawfirm filed no Motion for Reconsideration and in addition delayed preparation of the Appeal Brief to such a degree that he was compelled to discharge Durant & Durant and retain current counsel to prepare and file said Brief on or before the deadline of November 5, 1979. See Appendix N below.

REASONS FOR GRANTING RELIEF FROM JUDGMENT

I.

In addition to the reasons stated in the Petition for Writ of Certiorari, "exceptional circumstances" prior to and after Summary Judgment justify setting aside the Summary Judgment pursuant to Rule 60(b),(1),(2), and (6), Federal Rules of Civil Procedure and Rule 22.6, Rules of the Supreme Court of the United States.

What should be of greatest concern is the apparent appearance of impropriety on the part of Mr. Fried in retaining separate counsel without notice to Mr. Minye for purposes of preparing the response in reply to Defendants' Motion for Summary Judgment and Brief when that separate counsel was a co-author with Defendants' attorney. When viewed from the standpoint that Petitioner was compelled to discharge Mr. Fried, he incredibly retained another lawfirm which again mishandled his case by not timely filing a Motion for Reconsideration or an Appeal Brief. This combination of unfortunate events must be reviewed in light of the recent, as yet unpublished, 9th U.S. Circuit Court of Appeals *Hearst* decision allowing a hearing to determine whether a "potential conflict of interest" on the part of her attorney, F. Lee Bailey, prevented Miss Hearst from getting a fair trial. The mere fact that Mr. Bailey was planning to write a book about her case while he conducted her trial was deemed to be sufficient to determine whether the potential conflict of interest prevented a fair trial and was found to be sufficient to warrant a hearing. Here the circumstances in *Minye v. University of Michigan* certainly appear to be just as sufficient, if not more so, to reopen his case.

Petitioner's Supplemental Brief is brought pursuant to Federal Rules of Civil Procedure 60(b), (1), (2), and (6) which, inter alia, provides discretionary authority to relieve a party from a final judgment for "(6) any other reason justifying relief from the operation of Judgment." It will be argued that Petitioner has not timely requested relief under Rule 60 (1) and (2), however, Rule 60 does not preclude consideration of such relief pursuant to reason (6) of said Rule authorizing such relief for "any other reasons justifying relief from the operation of the Judgment."

A basic premise in any attorney's legal wisdom is that in the face of a Motion for Summary Judgment based on no genuine issue of material fact, everything in the attorney's power must be done to raise at least one material disputed issue. Mr. Fried grossly neglected to do those things which should have been normally within his wisdom. Instead, he indicated in his Answer to the Attorney Grievance Commission that he withheld vital evidence as a "trial tactic." He also directly ignored the trial court's request for additional information and deposition cross referencing. The easily obtainable Affidavit of Dr. Cohan and the patients' statements should have been included in a Supplemental Reply to Defendants' Motion for Summary Judgment. Failure to raise evidentiary objections to the thirty (30) exhibits attached to Defendants' Supplemental Brief precluded serious consideration by the Sixth Circuit Court of Appeals of their inadmissibility, although such objection was raised on appeal. This particular evidentiary objection was extremely crucial in that many of the unauthenticated exhibits attached to the Defendants' Brief were subject to dispute and, for the further reason that the language of the opinion and judgment rendered by the trial court indicated that those exact same exhibits were relied upon by the court as the basis for its judgment.

The events outlined herein constitute classic "exceptional circumstances" requiring that justice afford at least one more view of this case, especially in consideration of the extreme hardship placed upon Mr. Minye in being dismissed from the University of Michigan School of Dentistry only three months prior to graduation. No other form of relief available can replace the opportunity lost to have his day in court in an effort to salvage a lifelong career.

Although it may first appear that attorney neglect does not adequately establish a basis for relief pursuant to Rule 60(b), (6), FRCP, such neglect and similar forms of misconduct have formed the basis for properly setting aside judgment. The case of *Stevens v. Stoumen*, D.C. Pa, 1963, 32 F.R.D. 385 stands for the proposition that although in the usual case, a Motion to Vacate Judgment for excusable neglect is untimely if filed more than one year after entry of judgment, excusable neglect may be treated as "any other reason" justifying relief from operation of judgment if the circumstances are exceptional. Petitioner contends that the circumstances in this case are exceptional and constitute such neglect. Plaintiff was wholly unaware of the trial strategy and recalcitrance of his attorneys and the reasons stated herein should be treated as "any other reason justifying relief" pursuant to the *Stevens* case.

In order to accomplish substantial justice, Plaintiff's case should be reopened and in further support for that proposition, cites the cases of *Klapprott v. United States*, N.J. 1949, 69 S Ct. 384, 335 U.S. 601, 93 L. Ed. 266, Motion denied 69 S Ct. 877, 336 U.S. 949, 93 L. Ed. 1105, *Patapoff v. Vollstedt's, Inc.*, C.A. Or, 1959, 267 F 2d 863 and *L.M. Leathers' Sons v. Goldman*, C.A. Mich 1958, 252 F 2d 188. The principal stated in *Klapprott* is that subdivision (b), (6), of FRCP 60 permitting the Court to relieve a party or legal representative from a final judgment for any "other reason" justifying relief from operation of the judgment vests the Court with power adequate to enable it to vacate judgment whenever such action is appropriate to accomplish justice.

Further legal support is provided for the principle that where grounds for a Motion to Vacate a Dismissal were the gross negligence of Plaintiff's former counsel and the absence of neglect on the part of the Plaintiff, the Motion can properly be made under subdivision (b), (6), of Rule 60 for any reason justifying relief other than those specified under Subdivision (b), (1), for excusable neglect. See *King v. Mordowanec*, D.C.R.I. 1969, 46 F.R.D. 474.

This Honorable Court, if for no other reason, should reverse the Summary Judgment on the basis that Mr. Fried, Petitioner's trial attorney, stated a deliberate falsehood to the Attorney Grievance Commission in his Answer in Response to Plaintiff's Complaint for the mishandling of this case at the trial court. Mr. Fried's statement that the lower court had been affirmed at a time seven months prior to actual affirmance certainly provides a basis for the notion that his gross neglect constituted actual unethical misconduct, and therefore, since attorneys are officers of the Court, their conduct, if dishonest, would constitute a fraud on the court for the purpose of a Motion for Relief from Judgment. *H.K. Porter Company, Inc., v. Goodyear Tire and Rubber Company*, C.A. Ohio 1976, 536 F 2d 1115.

The combined mishandling of Petitioner's case at the trial level through recalcitrance and neglect, the fact that Mr. Minye paid exorbitant fees for preparation of a Motion for Reconsideration well within the time for filing same but which never occurred, the subsequent falsehood represented by Mr. Fried to the Attorney Grievance Commission and the disastrous effect the foregoing has had on Mr. Minye's appeal efforts and career, constitute exceptional circumstances warranting the relief requested.

RELIEF REQUESTED

For the reasons above set forth, Petitioner respectfully prays this court issue its Order Setting Aside the Summary Judgment and Order affirming same and remand his case to the trial court for an evidentiary hearing or trial on the merits.

Respectfully submitted:

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Dated: November 10, 1980

APPENDIX A

(United States District Court
Eastern District of Michigan
Southern Division)

Leslie Minye, Plaintiff, vs University of Michigan, et al, Defendants. Case No. 77-2421

AFFIDAVIT OF RICHARD P. COHAN, A.B., D.D.S., M.S., M.A. (Educ.)

State of California
County of Marin—ss

I, Richard P. Cohan, A.B., D.D.S., M.S., M.A., being first duly sworn, upon oath, do hereby state as follows:

1.) That I am a Doctor of Dental Surgery and Associate Professor of Oral Diagnosis and Radiology at the University of the Pacific, San Francisco, California, am an expert in the area of dentistry and dental education, and if called upon as a witness, I can competently attest to the truth of statements made herein.

2.) That on or about December 17, 1978, I was contacted by letter dated December 14, 1978, from attorney David H. Fried, attorney for Plaintiff in the above captioned matter.

3.) Attorney Fried contacted me for the purposes of retaining my services in reviewing pertinent materials and the work product of Mr. Leslie Minye pursuant to the issues in dispute in the above captioned matter and for the further purpose of reviewing deposition transcripts of certain members of the University of Michigan School of Dentistry taken pursuant to said litigation and rendering my professional opinion as to the work product and competence of Mr. Minye during his dental school career at the University of Michigan.

4.) That I in fact was retained by attorney Fried on behalf of Mr. Minye and performed certain services including meeting on December 21, 1978 with Mr. Minye and conducting an interview with him wherein I gained impressions of his knowledge of dentistry and the amount of work which he had successfully completed prior to his dismissal in the summer of 1977.

5.) That in addition, my services entailed forwarding to Mr. Fried a curriculum vitae and my personal notes regarding my interview with Mr. Minye and my review of his work product together with my review and analysis of depositions taken in this litigation of University of Michigan School of Dentistry Department Chairman Charbeneau and Ramfjord, Staff Instructors Dr. Pape, Margeson and Kahler and Mr. Minye. I also reviewed exhibits purportedly offered at the Depositions of those individuals.

6.) That pursuant to my review, I formed the opinion that based on the work and the facts learned from the depositions and supporting records, there is ample reason for believing that an excellent chance existed of Mr. Minye being readmitted to the University of Michigan School of Dentistry and agreed to testify to establish the basis therefore.

7.) That on December 22, 1978, I composed a letter to attorney Fried with attachments including a letter dated December 22, 1978 to Steven Keyser, J.D., Director, Medical Malpractice Experts, a curriculum vitae dated December 21, 1978, and photocopies of my notes regarding the review and analysis previously mentioned, copies of which are attached hereto constituting a one page letter to Mr. Fried dated December 22, 1978, a four page curriculum vitae with three additional pages containing publications by me, continuing education courses given, major continuing education courses attended and the notes containing fourteen pages so numbered and interview notes designated A through D, all of which material is a true expression of my opinion regarding Mr. Minye and his work and competence.

8.) That I caused said materials referred to in the preceding paragraph to be mailed with the letter dated December 22, 1978, to attorney Fried on December 22, 1978.

9.) That thereafter I received a letter from Mr. Minye dated January 23, 1979, which I included in my file on Mr. Minye.

10.) That thereafter, I was ready, willing and able to testify on behalf of Mr. Minye or sign any affidavits in support of Mr. Minye's complaint and in response to the University of Michigan's Motion to Dismiss or Alternative Motion for Summary Judgment based on no genuine issue of material fact, however, at no time was I requested to do so by attorney Fried.

11.) That my review of the Depositions of certain members of the faculty, particularly those of Dr. Charbeneau, Dr. Pape, Dr. Kahler and Dr. Ramfjord, led me to believe that in comparison with other schools of dentistry, the treatment by the University of Michigan Instructors of Mr. Minye and their evaluations of his work appeared to be unreasonable and designed to create an academic environment purposely unfavorable to Mr. Minye's candidacy for the D.D.S. degree with the possible basis being a lack of communications between a student and instructor elevated due to Mr. Minye's bilingual background. Furthermore, my review and analysis resulted in the impression that the University of Michigan School of Dentistry instructors involved with Mr. Minye's work acted arbitrarily in certain instances and seemed to erect unusual requirements and road blocks for the purposes of denying matriculation to Mr. Minye toward the D.D.S. degree.

Further deponent sayeth not.

/s/ RICHARD P. COHAN, A.B., D.D.S, M.S., M.A.

(certification ommitted in printing)

APPENDIX B

SCHOOL OF DENTISTRY
UNIVERSITY OF THE PACIFIC
2155 WEBSTER STREET

December 22, 1978

Mr. David H. Fried, Esq.
Attorney at Law
1710 Buhl Bldg.
Detroit, Michigan 48226

Re: LESLIE MINYE
Your File 77 3089

Dear Mr. Fried,

Yesterday I met with your client, Mr. Leslie Minye. As I indicated in my letter to Mr. Keyser (copy enclosed), I am impressed with Leslie's knowledge of dentistry and the amount of work that he passed prior to being dismissed. The work that he showed me ranged from below average to above average. Based on this work and the facts learned from the depositions and supporting records, there is ample reason for his case coming to trial and I am inclined to support that effort should you require my services.

Enclosed herewith are the following additional items:

1. Copy of my current Curriculum Vitae
2. Copy of my log for services rendered and my notes concerning the depositions reviewed
3. Copy of my notes from the interview on December 21st

In reviewing my notes, one area that I did not discuss with Leslie in adequate detail was the events leading to the failure (E grades) in the Fall semester of his Senior year in Operative and Periodontics. I would like to obtain additional information at his convenience.

Additional billing not included in the enclosed log amounts to two and one-half hours ($250.00) for services rendered today's date. Best wishes for an enjoyable holiday season.

Sincerely yours,

/s/ Rick
Richard P. Cohan, A.B., D.D.S., M.S.
Associate Professor of Oral Diagnosis and Radiology

APPENDIX C

SCHOOL OF DENTISTRY
UNIVERSITY OF THE PACIFIC
2155 Webster Street

December 22, 1978

Steven Keyser, J.D., Director
Medical Malpractice Experts
2550 Fifth Avenue, Suite 405
San Diego, California 92103

Dear Steven,

Enclosed is a copy of my Curriculum Vitae for your file. I appreciate having the opportunity to provide a service in the Minye case. Yesterday I discussed the matter with him for several hours. He impressed me with his knowledge of dentistry and in terms of the total amount of passing work he claims to have done before being dismissed from the University of Michigan. Should the case come to trial, I believe he stands an excellent chance of being readmitted based on the facts I know at his time.

Best wishes for a happy holiday season.

Sincerely yours,

/s/ Rick
Richard P. Cohan, A.B., D.D.S., M.S.
Associate Professor of Oral Diagnosis and Radiology

APPENDIX D

STATEMENT OF MRS. CHARLOTTE KING

This is Donald K. Faunce interviewing Mrs. Charlotte King at her residence, 862 Canterbury Drive, Canton Township, Michigan on December the 9th, 1977 at 10:30 a.m. This statement of Mrs. King is in connection with Mr. Leslie Minye's education at the University of Michigan.

(1) Q. Mrs. King, do you understand that we're recording this as a statement?

A. Yes, I do.

Q. Would you please tell me your full name and age.

A. It's Charlotte Jeanne (CK) King.

Q. Go ahead.

A. I'm 29 years old.

Q. And what is your husband's name?

A. David Stuart King.

Q. Do you have any children?

A. No, we don't.

Q. Stuart, S T E W?

A. S T U A R T.

Q. Alright, and what is your date of birth, mam?

A. 7-13-48.

Q. Alright, are you employed?

A. Not at this time.

Q. Do you have a profession, nurse or something like, teacher?

A. I was a control clerk in the emergency room.

Q. Control clerk in the emergency room, where?

A. Oakwood Hospital.

Q. And you're presently unemployed then?

A. Yes.

(page 1 signed by Mrs. C. King)

(p. 2) Q. Alright, now, were you at one time a dental patient of Mr. Leslie Minye at University Hospital in Ann Arbor?

A. Yes, I was.

Q. Alright. Do you recall when you last saw Mr. Minye?

A. Ah, not, not the exact date or the time, no, I don't.

Q. Was it a year ago, ah, 9, 10 months ago.

A. Approximately 9 or 10 months ago.

Q. Okay, that's the last time you saw him?

A. Yes, um-hmm.

Q. How many times had you seen Mr. Minye at the dental school?

A. Oh, gee, quite a few times. I don't recall exactly how many but a number of times.

Q. Okay, what type of work was he doing on your teeth?

A. Oh, he did some periodontol work and he did ah, some inlays and he did a couple bridges, one bridge and a gold crown.

Q. Alright, so, he saw you quite a few times?

A. Yes.

Q. Ah, during the time that Mr. Minye was treating you did you have any reason to object to his treatment?

A. No, never.

Q. What did you feel, as a layperson, concerning the quality of his work?

A. It was excellent.

Q. Alright, during the time that you were at the dental school in the chair did you ever observe anything that was unusual, or an unusual comment, you felt, an unusual comment made by an instructor?

A. Yes, ah, once I commented to Dr. Minye on a comment of one of the instructors. Dr. Minye had just finished ah, checking where my

(page 2 signed by Mrs. C. King)

(p. 3) A. (Continued) teeth came together with some black paper or, some, I don't know what you call it.

Q. Um-hmm.

A. And one of the instructors came up to check his work and told Dr. Minye to wash his hands 'cause they were filthy and, I really commented on that because I had never, as many times where I'd been a student or ah, a patient there I had never heard an instructor treat a student that way.

Q. In your opinion, were Dr. Minye's hands filthy?

A. No, he had just finished using that black paper and he washed his hands, every time he came up to me he would wash his hands.

Q. Alright. Now, did you ever observe Dr. Minye in a rough dreassage, let's put it that way, or poor dress?

A. Never, never.

Q. Was Dr. Minye always polite to you?

A. Dr. Minye is one of the most courteous people I've ever met.

Q. Alright, could you understand his use of the English language?

A. Yes.

Q. You had no difficulty in communicating?

A. No, no.

Q. Ah, was there anything at all, that you can recollect, that was objectionable of Dr. Minye?

A. No, nothing whatsoever.

Q. Okay, ah, at your age, I assume you've had previous dental work?

A. Yes, I have.

Q. Um-hmm, Was this your first time at the University Dental Clinic?

(page 3 signed by Mrs. C. King)

(p. 4) A. Ah, yes, that was my first I had been called as a patient.

Q. Alright, okay, ah. . .

A. I think I had one or two others taking care of me too and none of the students any time had ever, you know, been objectionable in their treatment.

Q. Alright, um-hmm. And were there any other incidents that you can recollect, in respect to any instructor's comments with Dr. Minye?

A. None of the other ones. If they had anything to say to him they would take him aside and a very low tone of voice that I could not hear. They would talk to him but ah, they did that with the other students too, so . . .

Q. Alright, you thought nothing unusual about that?

A. No, um-umm.

Q. Okay, ah, well had you ever, this is a delicate question, I'm going to ask it. Had you ever recall any time that you felt that Dr. Minye was unclean in any way?

A. No, no.

Q. Ah, I assume you've had an opportunity to see Dr. Minye working on other patients while you were waiting, or would you be in a separate room?

A. I would be in a separate room.

Q. Okay, so you couldn't observe that?

A. No, no, when I was there I was the only patient.

Q. Um-hmm, now would there be patients nearby, in other chairs, like in cubicles?

A. Yes.

(page 4 signed by Mrs. C. King)

(p. 5) Q. Um-hmm, alright. Did you ever observe any other of the students ah, talk to Dr. Minye in, in an insulting way of any kind?

A. No, no.

Q. Did you feel that that comment made by the instructor about Dr. Minye washing his hands was sort of insulting?

A. Yes, I did. I, I was really shocked.

Q. Um-hmm.

A. At the tone of voice and the comment, that the comment was made at all because, like I say, I've never heard any of the instructors that have come to inspect the work, or check the work, ever made any kind of comment like that.

Q. Do you recall the ah, what this instructor looked like?

A. Ah, not . . .

Q. An older man, a younger man?

A. He was an older man.

Q. Um-hmm, was he a heavy man, or thin man?

A. I think so.

Q. Thin man?

A. Yeah, or medium build.

Q. Was he a white man?

A. A white man.

Q. And you think, he was an older man?

A. Yes.

Q. Um-hmm, alright. Do you have any idea of his name, his identity?

A. No, I don't.

Q. Alright, do you recall if he had long hair, mustache or anything like that?

(page 5 signed by Mrs. C. King)

(p. 6) A. Ah, fairly short well groomed hair.

Q. Um-hmm, alright, is there anything else you'd like to add to this statement?

A. Just that, like I said, I have been very well satisfied with the work Dr. Minye has done. He has always been extremely polite and courteous and really clean. Every time he has come up to my chair he has washed his hands, if he's been doing something that's been messy and he's been given a chance, he's washed his hands. As I said, at this time, when that instructor came up, he hadn't even a chance to, he'd just finished making the impression in my mouth, you know, with that paper. He hadn't had a chance to turn around and wash his hands.

Q. I see, alright. Could you observe if that paper had left any residual on his hands of any sort?

A. It had left black marks on his hands, it had left black marks on my teeth because he was bringing my teeth together with it.

Q. I see, alright, is there anything else?

A. Not that I can think of right now.

Q. By the way, is this your husband present this morning?

A. Yes, he is.

Q. Now, if there's nothing else, do you understand that this has been continuously recorded as your statement?

A. Yes.

Q. Is it a true and accurate account of your, of the events that you've related to me, to your best recollection?

A. Yes.

Q. Alright, we'll have this statement transcribed and brought out to you and ask that you review it and sign it, would you agree to that?

A. Yes.

Q. Alright, that'll conclude the statement.

(Handwritten at bottom of page 6: I have read all six pages and they are true. 12/15/77. /s/ Mrs. Charlotte Jean King)

APPENDIX E

STATEMENT OF RONALD L. VILLENEUVE

This is Donald K. Faunce interviewing Mr. Ronald L. Villeneuve, is that correct? Villenev, Villenev? (sic) (Villeneuve) of 6840 Plainview (sic) (Plainfield) Street, Dearborn Heights, Michigan, on the night of March 28, 1978. This statement concerns a ah Doctor Leslie Minye who is an ex-dental student at the ah University Hospital at University of Michigan in Ann Arbor. This statement is made on behalf of Dr. Leslie Minye.

(1) Q. Sir, do you understand that we're recording this as a statement?

A. Yes I do.

Q. Tell me your full legal name.

A. Ronald Lawrence Villeneuve.

Q. And what is your age sir?

A. Forty.

Q. And ah, your date of birth?

A. June the 22nd, 1937.

Q. And ah I assume you are married?

A. Yes.

Q. What is your wife's name?

A. My wife's name is Carol.

Q. Carol?

A. Right.

Q. And ah this is your legal residence?

A. Yes.

Q. Fine sir. Ah . . . you have indicated to me sir, that you presently recovered from a heart attack, is that right?

A. Yes.

Q. Are you under any particular medication that might cause you to . . . having difficulty to converse with me?

A. No.

Q. Alright. Ah, what's your occupation sir?

A. I'm a General Foreman.

Q. Where at?

A. Patterson Lake Products.

Q. Patterson Lake Products?

A. Products.

Q. Where is that at?

A. That's in Pinckney Michigan.

Q. Alright, Ah-um, now when did you become, um a . . a patient at the ah University of Michigan?

A. Approximately it was either March or April of 1977.

(Handwritten at bottom of page 1: with exceptions as noted. /s/ R. Villeneuve.)

(p. 2) Q. Alright. And is that when you first became ah, ah a patient of Dr. Leslie Minye?

A. I believe it was in that general area . . . within a month or two of that I believe I became his first patient. I would have to check my records to see.

Q. Initially, what was the . . . ah, it for, do you recall?

A. Periodontal aah . . .

Q. Periodontal work?

A. Right.

Q. Ah, now, ah . . . did you ever have any difficulty in communicating or understanding that doctor . . . ah Minye?

A. No I did not.

Q. And uh, ah could you uh . . . uh indicate to me his general appearance? Was he clean, he, dressed properly? What.

A. Well, I uh, thought that he had put on a ah . . . very good appearance. I was well pleased with the uh, appearance of Mr. Minye — he always looked clean, and ah . . . appearance, ah . . . was very very much you might call, I guess professional appearance.

Q. Uh um, alright. Ah what about ah . . . ah his explanation of procedures. Did you understand them?

A. Yes, I could understand them. He would . . . he would explain to me what he was going to do prior to any function that he did with me.

Q. Alright. Ah-um, and was he . . . ah-um . . . would you consider him ah-um cautious, or what?

A. I would consider him VERY cautious . . . ah, ah, he would ah, ask me at the time that, ah, he was going to do this. He would let me know . . . tell me to be sure to let him know if he hurt me in any way. He tried to be as gentle as possible, and he was working on, ah, . . . the, ah, all my teeth and ah . . . I felt that he was extremely . . . you know . . . extremely cautious with me.

Q. Alright.

A. Very very ah . . . ah . . . he looked after his patient.

Q. Okay. Ah, now do you recall anything about eh . . . some discussion eh . . . with ah, any other . . . instructor concerning any calcium deposits you might have had? You remember anything at all about this?

(page 2 signed by R. Villeneuve)

(p. 3) A. Not really. Um . . . I know not really.

Q. Alright. Ah-um, about how many times did you see Dr. Minye, in your best estimate?

A. I'd say approximately six — I wouldn't . . . in that general area four to six times.

Q. Alright, four to six times. Okay, ah-um, now you said that you could understand him. Ah-um you of course were aware that he did have an accent.

A. Yes, definitely. And ah-um I could understand him, ah, in fact we had talked about where . . . where he was going to practice at, ah at the ah end of this term, etcetera, etcetera, so I could carry on a conversation with him.

Q. Alright. Okay. Ah-um, so to sum up then, did you feel that he had a pretty much of a professional appearance?

A. Yes I think he did.

Q. Uh-um. Okay. Ah, was there anything at all that you can recollect that might have been objectionable about ah Dr. Minye.

A. Off-hand no I can't think of anything as might . . . ah that was objectionable . . . as a matter of fact I was quite surprised when I found out that he wasn't my . . . ah student any longer. I thought he had graduated.

Q. I see. Alright.

A. When I left him in August . . . he was taking the month of August off and ah . . . I believe that it was the month of August off and that when he come back I eh I'm ah that when September rolled around I had a new student . . .

Q. Uh-um.

A. And I thought he had graduated.

Q. I see. Okay. Alright now eh . . . is there anything that you can think of uh in connection with your treatments by Dr. Minye that you feel is important you'd like to add to this statement? Do you think we covered everything that you know about?

A. Well I feel that he had ah . . . the uh only thing I do feel that he did give me extra . . . well I might say extra special treatment type

(page 3 signed by R. Villeneuve)

(p. 4) thing. He was really . . . really looked after his patient.

Q. Okay.

A. If I wanted . . . If I could put it in that manner.

Q. Alright. Fine . . . Ah, we always ask this as part of our records, sir, ah what we call an anchor address, in case you should move and we want to contact you ah . . . do you have a family living in this area? Parents or anything like that? Children or ah . . . brothers or sisters?

A. Yes, but I don't know my sister's address, and ah . . .

Q. Okay. Its alright. Okay.

A. I have relatives in the area.

Q. Then uh-um you consider yourself as a permanent resident

A. Well we were going to move. As a matter of fact we were going to move up until two weeks ago and then uh . . . due to my attack we have decided that we are going to stay here, so I'm here for awhile . . . ha ha ha hum hum hum . . .

Q. So . . . if you move would you move out of state?

A. No.

Q. I see.

A. No. Definitely no.

Q. Okay. And I assume ah you . . . you plan on staying at Patterson Lake Products?

A. Yes.

Q. Alright. Fine. Ooookaaay . . . if there's nothing else then sir, then do you understand that this has been continuously recorded as your statement?

A. Yes I do.

Q. And it is a true and accurate account uh uh . . . to the best of your recollection?

A. Yes it is to the best of my recollection.

Q. Sir, we'll have this statement transcribed and will bring it out to you and ask that you read it over, and if you wish, errr . . . we will ask that you sign it. Do you agree to that?

A. Certainly.

Q. Alright, then that concludes the statement.

(Handwritten at bottom of page 4: I have read these 4 pages and they are true with the exceptions noted on page 1. /s/ R. Villeneuve)

APPENDIX F

STATEMENT OF MRS. COLETTE ROBINSON

This is Donald K. Faunce inter iewing Mrs. Colette Robinson of 1711 Park Road, Jackson, Michigan on April 7th, '78. This interview and statement concerns a Dr. Leslie Minye, a former dental student at the University School in Ann Arbor. This statement is made on behalf of Dr. Leslie Minye. Ah, Mrs. Robinson, do you understand that we're recording this as a statement?

(1) A. Yes, I do.

Q. Do we have your permission to record this?

A. You certainly do.

Q. And please tell me your full legal name.

A. Colette Urbain Robinson.

Q. How do you spell your middle name?

A. Ah, that's my maiden name, that's U R B A I N.

Q. Okay, that's your maiden name?

A. Right.

Q. And Colette is C O L?

A. One L, two T's and an E. C O L E T T E.

Q. Alright, and how old are you, Mrs. Robinson?

A. Ah, 50.

Q. 50, alright, and your legal residence is here on Park Road?

A. 1711.

Q. Right. And I understand, ah, are you married, single, divorced, or what?

A. Divorced.

Q. Divorced. And ah, what is your occupation?

(p. 2) A. I'm a school teacher.

Q. Where at?

A. With the Jackson Public Schools.

Q. The what?

A. With the Jackson Public School.

Q. Okay. What school?

A. Ah, Parkside High School.

Q. Alright. Ah, do you recall Dr. Leslie Minye?

A. I most certainly do.

Q. Alright, Ah, did he handle your peridontal problems?

A. Yes, he did.

Q. Alright, that was on your gums, then, right?

A. Right.

Q. Alright, during the time he was working on you did you ever have any objections to his work?

A. Absolutely none.

Q. What was his mannerisms?

A. Oh, I thought it was excellent. He was very concerned about whether he was causing any pain or anything. He was very, very patient.

Q. I see. Alright and ah, did you ever hear an instructor chastise him, or correct him?

A. Ah, on one occasion I thought that the instructor was perhaps a little bit ah, well, yes. Was a little bit overly critical.

(p. 3) Q. I see. Alright. You don't know who that instructor was, by any chance?

A. No. No, he was speaking behind me and I considered it was none of my business.

Q. I see, alright. Ah, now in concerning Dr. Minye's dress, did he always seem to be properly dressed and clean-cut appearing?

A. Oh, absolutely, he, he, was just like the other dental students.

Q. Um-hmm. Would he be dressed in a type of a white coat, or what?

A. Yes, right.

Q. Alright, what about his cleanliness, about his hands or anything . . .

A. Excellent.

Q. Excellent? I see. Could you understand Dr. Minye?

A. Yes.

Q. You had no problem understanding him?

A. No, as long he seemed or having any problem understanding me. We're both from Europe.

Q. Oh, I see. What is your ethnic background?

A. I am from Belgium.

Q. You're Belgian?

A. Yes.

Q. I see. Uh-huh. You had no problem at all understanding?

A. None whatsoever.

Q. Okay. Alright. Ah, are you still a patient at the dental school?

(p. 4) A. No, I had to drop out because I had an accident in December of 19 ah, 69 and ah, I was transferred to Saint Joseph in Ann Arbor and as soon as I was able to after the surgery I contacted Dr. Minye at the dental school to tell him that I would not be able, I had a broken neck and I told him that I would not be able to return to the school for quite some time and ah, he mentioned at the time that he had tried to contact me at home in Jackson. And he wondered why there'd been no answer. But I'd been hospitalized in Jackson prior to being transferred.

Q. Alright. When was the last time you saw Dr. Minye as a patient, do you recollect?

A. No, I don't because at the same time I, I had a blow on the head, my memory of certain dates, is very . . .

Q. I see. Alright. So,

A. I could look it up.

Q. Yeah, well, it's gotta be what, some, more than a few years ago?

A. No, it was in '69.

Q. 69?

A. Yes, I mean 70, no, '69. Wait a minute, what are we . . .

Q. '69, that's nine years ago.

A. I am sorry, it's not '69, ah. . .

Q. '76?

(p. 5) A. '76.

Q. 1976 you had an accident?

A. Yeah. And anything that's happened ah, shortly before that is very, except I remember, you know, when I was in the dental chair.

Q. Alright.

A. But dates and —

Q. So you saw him sometime in, probably the fall or summer?

A. In the fall, definitely in the fall.

Q. The Fall of '76. Okay. Alright, and how many times do you think you saw him, roughly?

A. Ah, he was the second dentist who took care of —

Q. He was the what?

A. He was the second dentist I was assigned to.

Q. Second dentist?

A. And ah, oh, my, I'd say about 6, 7 times.

Q. 6, 7 times. Alright, and you never had any objections to him?

A. None, whatsoever. He was very patient with it.

Q. Alright. Okay, and there was nothing about his professional approach that you conside (sic), that you had any objections to?

A. No, he was timid and he gave me the appearance that he felt —

Q. He'd give you what?

A. He'd give me the appearance that he felt that he was ah, being watched very closely.

(Handwritten at bottom of page 5: I do not recall making this statement. CHR)

(p. 6) Q. Oh, is that right?

A. You know ah, he wasn't as bold and sure of himself, and ah, I got to sympathize. (Handwritten: no recollection of making this statement CHR)

Q. You sympathized with him?

A. Well, shortly after I heard the gruff manner in which he was approached.

Q. Oh, he was approached by . . .

A. He was approached by the instructor who came to correct his work.

Q. In somewhat a rough manner, you say?

A. Um-hmm.

Q. I see, okay. Is there anything else you'd like to add to this, concerning Dr. Minye?

A. No, I certainly would appreciate an opportunity to be his patient again.

Q. I see, very good. Alright then, do you understand, now that this has been continuously recorded as a statement?

A. Yes, I do.

Q. Alright, and is it a true and accurate account to the best of your recollection?

A. Ah, it certainly is, I'm glad you corrected me on the dates, I was confused.

Q. I see.

A. But it definitely is, yes.

Q. Okay, then ah, we'll have this statement typed and get it out (p. 7) to you and ask that you look it over and ask you to sign it. Would you agree to that?

A. Oh, I certainly will.

Q. Alright. Then that'll conclude the statement.

(Handwritten at bottom of page 7: While the general contents are true, it appears to me that some statements have been editorialized. /s/ C. Robinson)

APPENDIX G

STATEMENT OF ANTHONY SUMMITT

This is Donald K. Faunce interviewing Anthony Summitt at his residence, 17190 Hannan Road.

(p. 1) Q. What's city is this?

A. New Boston.

Q. New Boston, Michigan on Sunday, April 9th, 1978 at 1:30 p.m. This statement concerns ah, Dr. Leslie Minye. This statement is made on the behalf of Dr. Leslie Minye. Anthony, do you understand that this is being recorded as a statement? Do you understand that?

A. Yes.

Q. Is your father present here, today?

A. Yes.

Q. What's your father's name?

A. Kenneth.

Q. And what is your mother's name?

A. It's Ann.

Q. A N N E?

A. No, A N N.

Q. Alright, and how old are you, Anthony?

A. 16.

Q. What's your birth date?

A. 9-8-61.

Q. Alright ah, what is, what is your home phone, here?

A. 753-4116.

Q. And ah, do you recall being treated at the University Dental (p. 2) School in Ann Arbor by a Dr. Leslie Minye?

A. Um-hmm.

Q. You do recall?

A. Yes.

Q. When was that, roughly?

A. Ah, last ah, last December, in the winter.

Q. Winter of '77?

A. Yeah.

Q. Okay. Now, what did he do?

A. He ah, put in a three unit bridge?

Q. Alright, did he also put in a crown?

A. Ah . . .

Q. Do you recall?

A. Yes.

Q. You think a crown?

A. Yes. And he capped my two front teeth.

Q. Okay.

A. And he put in a, he put in a gold filling, too.

Q. Okay. In your front?

A. Yeah, capped my two front teeth. Plus put a gold filling in the back.

Q. Okay. And ah, during the time that the doctor was taking care of you, ah, how did you feel about him, on, did he, you know, in respect to his work?

(p. 3) A. He was a good dentist. I liked the way he did his work and he explained everything to me, what he was gonna do.

Q. Alright, did he cause you any inconvenience, such as ah, unusual pain or anything?

A. No, he gave me a shot and everything before he did anything. He told me if it was gonna hurt or not.

Q. He would explain ahead of time?

A. Yeah. Yeah.

Q. Were you ever there, do you recall ah, when a instructor would talk to him? Do you remember any incidents?

A. Ah, yeah.

Q. What do you remember?

A. They was talking to him about . . . how to put the bridge in and ah, how to cement it 'n' everything.

Q. Um-hmm. Alright. Do you ever recall any instructor chastising, or bawling him out correcting him?

A. No, uh-uh. The instructors always said he did good work, yeah, most of the time.

Q. Yeah, alright. Now ah, when Dr. Minye would first see you, what would he do eh, would he, would he prepare himself?

A. No, he'd just say, "Hi, how are you doing?" "How you been?" and . . .

Q. Did he wash or what?

A. Yeah, he washed his hands all the time before he come in here, all the time.

(p. 4) Q. Would he usually be dressed in a white coat or something?

A. Yeah, um-hmm.

Q. Okay. Could you understand Dr. Minye?

A. Yeah, most of the times. Just a couple times I couldn't, you know.

Q. I see. Okay. Ah, if you couldn't, would you ah, ask him?

A. Yeah. To repeat his self.

Q. Then could you understand him?

A. Um-hmm.

Q. I see. Ah, what about his dress, other than the white coat? Was he dressed cleanly, or

A. Yeah, he had his hair combed and pants on and dress shoes.

Q. Um-hmm. Alright ah, well then, to recap this thing, would you consider Dr. Minye a clean person?

A. Yeah, yes.

Q. Alright.

A. And he always washed his hands 'n' stuff before he worked on me.

Q. Okay. Ah, and you do recall an instructor talking to him about how to cement your bridge in and things like that.

A. Yeah.

Q. But you never overheard an instructor ah, severely correcting him or reprimanding him?

A. Um--umm.

Q. Never did?

(p. 5) A. No.

Q. Okay, was your mother usually with you?

A. Yeah.

Q. In the treatment room?

A. Ah, no, she was always in the waiting room. Once in a while she'd come in there.

Q. Uh-huh. Okay. Was your mother a patient of Dr. Minye's?

A. No.

Q. Alright. Alright. Have you been back to the dental school since this?

A. Ah, yes.

Q. With a different student?

A. Yes, yeah.

Q. Alright, just for what? To —

A. To get my teeth cleaned.

Q. Okay. Alright, nothing, heavy work like Dr. Minye did?

A. No, um-umm.

Q. Alright, have you had any problems with your bridge or crown or anything?

A. Um-umm. No.

Q. No, alright. Okay, is there anything else, Anthony, you want to add to this?

A. No.

Q. Alright, do you understand that this had been continuously (p. 6) recorded as your statement?

A. Um-hmm, yes.

Q. And is it a true and accurate account to the best of your recollection?

A. Yes.

Q. Alright, we'll have this statement typed and get it up to you and ask that you read it over and have your parents read it over and we'll ask that you sign it, okay?

A. Yes.

Q. Alright, that'll conclude the statement.

(Handwritten at bottom of p. 6: I have read all six pages and they are true. /s/ Ann Summitt /s/ Mr. Kenneth W. Summitt /s/ Anthony Summitt)

APPENDIX H

ARGUMENT

Evidence Precluding Summary Judgment On No Genuine Issue Of Material Fact

1. Plaintiff's Affidavit attached to his Reply to Defendants' Motion for Summary Judgment contains a properly identified examination dated July 12, 1977, containing a question no. 5: "Describe the sequence and instruments used during the cementation appointment for 12^{25}. Minye's Answer "The area is washed and dried. It should not be dehydrated, however. 1-2-3 cavity medication is used. It is followed by application of Soltrol 130 to remove any oiliness." *Dr. Kahler* circled his words "1-2-3 cavity medication" and indicated NO and Dr. Kahler also circled the words "Soltrol 130" and wrote NO. It does not require a D.D.S. degree to refer to Page 187 of the text entitled *Operative Dentistry* written in part by Dr. Kahler at Page 187 under the subheading of "Cementation of the Gold Inlay" to see that the second full paragraph reads "with the isolated area dried, but not dehydrated, the 1-2-3 cavity medication is applied. Any residual oiliness from this medicine is removed by scrubbing with a cotton pledget of Soltrol 130." Why did Dr. Kahler circle the medication indicated on the answer when they are exactly as reflected in the textbook from which Mr. Minye was supposed to learn dentistry? Similar examples of apparent deliberate capricious grading by Dr. Kahler of Plaintiff's written examination appear in the attachment to Plaintiff's Affidavit. (447a-486a)

2. Plaintiff's Deposition Testimony relates incidents where requests by Plaintiff for evaluation by faculty members would be rebuffed with remarks such as "Why do you need that?" in a general atmosphere of hostility. (Minye Depn., 258a)

3. Plaintiff's testimony relates an incident arising from a critical clinical examination during the summer of 1977 when Dr. Margeson evaluated his work on a broken tooth as "finished margins look good, retention looks fine, external outline form, fine. If I am extremely critical, then it is probably too wide." Thereafter, Dr. Kahler came to his cubicle demanding to see the work and said "nothing is good with it, internal outline all around. I don't know how you could ruin it so badly." (Minye Depn., 259a, 260a)

4. Plaintiff's testimony relates that in the summer of 1977 he was removed from work on live patients and required to do work on typodonts by Dr. Kahler even though he had already accomplished the assignments in previous semesters in Operative Dentistry and even though he was allowed to work on live patients in Periodontics. (Minye Depn., 267a)

5. Plaintiff relates an incident where Dr. Cohen in Operative Dentistry was rude and unprofessional, he became angry after assigning a temporary restoration which another doctor told Plaintiff to complete by cementation after which Dr. Cohen became angry at Plaintiff for not having waited until the end of the day for Dr. Cohen to see the work prior to cementation causing Dr. Cohen to remark "I don't want to work with you anymore" and an incident with Dr. Cohen where he told Mr. Minye in the presence of his patient that "Mr. Minye, you look dirty. Get out and wash yourself." (Minye Depn., 267a-270a)

6. Plaintiff was accused of not speaking English in front of a patient by Dr. Fleszar. (Minye Depn., 273a)

7. Mr. Minye testified to an incident where Dr. Kahler, during his first semester, junior year, severely chastised Mr. Minye for not wearing his face mask to cover his beard even though he had not begun any clinical procedure work. (Minye Depn., 278a)

8. Again, Plaintiff testifies that Dr. Kahler during Plaintiff's senior year pulled Mr. Minye's mask down exposing his hair and mustache in front of another instructor and degraded him even though his facial hair was no longer than that of others. (Minye Depn., 279a)

9. Mr. Minye testified that during the summer of 1977, Dr. Kahler loudly chastised him in front of a patient for trivial matters not relevant to the quality of his work. (Minye Depn. 280a)

10. Dr. Kahler gave Plaintiff a clinical examination on a resin assignment which had never been given during any regular semesters. (Minye Depn., 281a)

11. Another Kahler incident occurred when Plaintiff, in the fall of 1976, passed a clinical examination in Operative Dentistry given by Drs. Margeson and Carpenter which was failed by 1/3 of his class. After Mr. Minye had brought this to the attention of Dr. Kahler, he showed surprise but said "Well it still doesn't make any difference. You will be removed from patient contact." (Minye Depn., 282a)

12. Dr. Charbeneau wrote a very poor report on Plaintiff's work even though he had never seen it. (Minye Depn., 284a, and Depn. Ex. No. 4, 336a)

13. An incident between Dr. Margeson and Plaintiff occurred after Plaintiff worked on a Class VI restoration. Dr. Margeson remarked that it was fine after which Dr. Pape went to the cubicle and said "It is no good" even though Dr. Margeson had told him "It's good, pack it up." Both instructors had seen the restoration at the same time. (Minye Depn., 286a)

14. Dr. Margeson had assigned a gold inlay to Plaintiff during the summer of 1977 but then Dr. Kahler called aside Dr. Margeson and Heys and after a 20 second discussion, Dr. Margeson revoked the assignment of the gold inlay and required Mr. Minye to continue with amalgams. (Minye Depn., 286a-287a) When questioned about this incident at his Deposition, Dr. Kahler could not recall the incident but did not think it occurred (Kahler Depn., 386a) but Dr. Margeson confirms this incident (Margeson Depn., 396a) and so does Dr. Heys (Heys Depn., 423a, Lines 1-3). Many of the incidents regarding Dr. Kahler related by Plaintiff at his Deposition were not remembered by Dr. Kahler (Kahler Depn., 371a, 379a, 385a-386a)

15. Drs. Heys, Pape and Margeson in Operative Dentistry refused to sign Plaintiff's computer cards during the summer of 1977 registering his work and evaluation thereof. (Minye Depn., 291a)

16. Dr. Ramfjord, Periodontics Chairman, accused Plaintiff of lacerating a patient's gums even though they had not been lacerated and Dr. Ramfjord had not seen Plaintiff working on this patient (Minye Depn., 293a; Ramfjord Depn., 113a-116a)

17. Dr. Zahn in Periodontics had evaluated Mr. Minye during the summer between his Junior and Senior

year of 1976 and approved his work; however, after Plaintiff was re-admitted after Dr. Cash, the Vice-President of the University had talked to Dr. Doerr, Dr. Zahn began to severely analyze his work and became overly critical. (Minye Depn., 294a-295a)

18. Dr. Klausner of Operative Dentistry, instructed Plaintiff to start a case on a patient who had acute Necrotizing Ulcerative Gingivitis and Plaintiff objected that the mouth should heal first. Dr. Klausner rebuffed him and instructed him to go ahead on the patient. Mr. Minye asked that Dr. Klausner confirm the assignment in writing which he did, angrily. Later, Dr. Charbeneau, Department Chairman, came to Mr. Minye's cubicle and asked how he dared to start this whole procedure. This particular patient had been assigned to Mr. Minye from both the Operative Dentistry Department and Clinical Periodontics and he had seen the patient five minutes apart. (Minye Depn., 297a-299a) Later, Dr. Charbeneau wrote the memo of November 16, 1976 accusing Mr. Minye of not recognizing a "full blown" acute Necrotizing Ulcerative Gingivitis. (Minye Depn. Ex. 4, 336a)

19. Dr. Rowe explained during a previous course that Mr. Minye should not concern himself with his mid-term exam and that he would be fine. Then, in the summer of 1977 he was required by Dr. Rowe to make an extensive outline which Plaintiff meticulously prepared but which Dr. Rowe rejected outright and, which resulted in Dr. Rowe propping his feet up on his desk a few inches from Mr. Minye's face. (Minye Depn., 300a)

20. Associate Dean Doerr suggested that Mr. Minye should seek an appointment with a psychiatrist or psychologist. (Minye Depn., 303a; Doerr Depn., 235a) Dr. Doerr stated that it was Dr. Kahler who suggested to Dr. Doerr that Plaintiff had some problems in comprehending operative procedure. (Doerr Depn., 235a)

21. Plaintiff had displayed some of his work in the form of rubber cast replicas of the original teeth to a practicing dentist who said his work was acceptable. (Minye Depn., 311a) Mr. Minye also showed his work to a fellow student who had since graduated who also declared it acceptable. (Minye Depn., 311a)

22. Mr. Minye admitted that he had an opportunity to meet with the Executive Committee after his first dismissal and denies he had an appointment for a second meeting. (Minye Depn., 332a)

23. Dr. Kahler testified at his Deposition that he did not recall the incident complained of by Plaintiff regarding his hair and his beard and states the length of the beard does not come into effect at the school. (Kahler Depn., 371a-372a)

24. Dr. Kahler testified that the three examinations given by him during the summer of 1977 to Plaintiff were not graded and had nothing to do with the failing status of Mr. Minye. (Kahler Depn., 373a-377a) However, Dr. Pape in his Depostion Testimony testified that in addition to the clinical work, the written exam counted as part of the final grade and that they would have been brought up in discussions with his superiors.

(Pape Depn., 349a) Plaintiff had been told by several of his instructors that he was being failed for his work in the summer of 1977 because of a failure of the written examinations, among other things. (Minye Affidavit, p. 2, 445a)

25. Dr. Kahler testified that the purpose of the written examination was to refresh Plaintiff's memory; however, he admitted that no courses prior to the examination were given to Plaintiff. Dr. Kahler could not specifically recall whether he told Plaintiff that he had failed the examination. However, Plaintiff was required to retake one examination. (Kahler Depn., 378a-380a)

26. Dr. Kahler acknowledges that he could have made the statement that Plaintiff was "unteachable" but does not specifically recall it. (Kahler Depn., 385a)

27. Dr. Kahler states that his only contact with Mr. Minye during the summer of 1977 was on a clinical examination dated July 20, 1977 and with the written exams. (Kahler Depn., 386a) However, as was corroborated by Dr. Margeson and Dr. Heys, Dr. Kahler had instructed that a gold inlay assignment be withdrawn from Mr. Minye. (Margeson Depn., 398a, Heys Depn., 423a)

28. Dr. Kahler testified that the reason certain computer card grades were marked out on one of Mr. Minye's assignments was that he had picked up the wrong card. (Kahler Depn., 388a and Depn. Exhs. 10 (392a) and 11 (393a) However, Mr. Minye alleges that the grades were changed deliberately after the initial evaluation. (Minye Depn., 253a-256a)

29. Dr. Kahler was the same instructor who had failed Mr. Minye in the fall of 1976 and who had failed Mr. Minye on the three written examinations and the clinical examination given on July 20, 1977. (Kahler Depn., 378a-389a) However, Dr. Kahler hedges on the question as to whether he observed anything in Mr. Minye during the summer session in 1977 to change his opinion that he did not know basics to which Dr. Kahler replied "I didn't work with him in the summer session that I recall. Maybe I got him once. I don't think so." (Kahler Depn., 390a) Thereafter, Dr. Kahler refuses to answer specifically what weight was given to the clinical examination of Mr. Minye during the staff determination of his final grade in Operative Dentistry and simply ends his testimony by stating "I honestly don't remember." (Kahler Depn., 391a)

30. Dr. Andrew Koran, voting member of the Executive Committee, testified that the Committee reviews grades and discusses a student's work applying certain written criteria to determine whether a student goes on probation, is warned or is dismissed. (Koran Depn., 203a) However, when specifically asked about his vote during the August 23 and 24, 1977 telephone survey of Committee members regarding Mr. Minye, Dr. Koran did not go beyond the grade of E reported and indicated that he had *never* seen any clinical or operative work of Mr. Minye. (Koran Depn., 203a-208a) If there were written guidelines and a general procedure to review a student's work, whether on vacation or not, should not the Committee have applied those guidelines to Mr. Minye at the end of the summer of 1977? Mr. Minye asserts that not only was his evaluation by his clinical instructors

arbitrary and capricious, but also the vote of the Executive Committee was arbitrary and capricious in disregard for its own guidelines.

31. When confronted with Mr. Minye's assertion that Dr. Koran indicated that he would be better off going to another school because the same problems would occur at University of Michigan, Dr. Koran denied saying so but then admits that he did say it was one of his options. (Koran Depn., 209a)

32. Dr. Gerald Charbeneau, Chairman of the Department of Operative Dentistry, testified that clinical instructors carry personal notebooks in which they record notes on students, however, after acknowledging that he himself had a book which he used when evaluating students, he does not know where his book is as it pertains to Mr. Minye and that his notes regarding Mr. Minye may well have been destroyed. (Charbeneau Depn., 149a-152a)

33. Dr. Charbeneau testified that Dr. Kahler told him about Plaintiff's beard (Charbeneau Depn., 153a-154a); however, Dr. Kahler had testified that he didn't even recall the incident with Mr. Minye's beard or hair and that the length of the beard did not come into effect with the staff at all. (Kahler Depn., 371a-372a) This certainly raises questions as to the credibility of Dr. Kahler's Deposition testimony in that his Department head, Dr. Charbeneau, acknowledges that Dr. Kahler brought up Mr. Minye's beard to the department head; however, his Deposition testimony is that he does not recall any incidents with Mr. Minye and that the hair and beard had no effect on the staff.

34. Dr. Charbeneau acknowledges that the acute Necrotizing Ulcerative Gingivitis case had been assigned to Mr. Minye by another staff member which Mr. Minye was reluctant to begin work on which ultimately resulted in the November 16, 1976 memo wherein Dr. Charbeneau accuses Mr. Minye of not recognizing a "full blown" acute Necrotizing Ulcerative Gingivitis. However, he makes the assumption that the tissues were in a state of health when the assignment was made. Later, he acknowledges that he would chastise the instructor who made the assignment for restorative treatment under the condition of the Gingivitis that he observed. (Charbeneau Depn., 164a-179a) In fact, Dr. Charbeneau acknowledges that the assigning instructor could have been misleading the student. (Charbeneau Depn., 169a) A form called a "treatment program" dated April 7, 1976, and *signed by Dr. Kahler*, says, regarding this Gingivitis case, "for urgencies on tooth No. 3 and the two teeth No. 12 and 13" and also indicates that the patient had Gingivitis. (Charbeneau Depn., 194a)

35. Associate Dean Doerr admits that it is not proper to accuse Mr. Minye of not speaking English or not speaking proper English and admits that to go to Mr. Minye's cubicle and pull his hair and say your hair is too long is improper. (Doerr Depn., 224a-226a)

36. Dean Doerr acknowledges that the instructor who said "Speak English" was in Periodontics but cannot recall the name of the instructor. He does recall speaking to the director of Periodontics, Dr. Nissle, about the comment to Mr. Minye. (Doerr Depn., 227a) Dr. Doerr also admits that Dr. Nissle

never responded to the comments and that Dean Doerr did in fact relate Mr. Minye's complaints to Dr. Nissle, Dr. Charbeneau, Dr. Ramfjord and that he made personal notes to that effect which were discarded immediately afterwards. (Doerr Depn., 228a-230a)

37. Dean Doerr acknowledges that Mr. Minye had successfully completed his first three years at University of Michigan Dental School according to his grade transcript and that summer of 1977 was to repeat two classes as a prerequisite to repeating his fourth year. (Doerr Depn., 237a-238a)

38. Dean Doerr acknowledges that Dr. Cash, Assistant to the President, talked with Dean Doerr about reviewing Mr. Minye's case after his first appeal was denied (Doerr Depn., 239a-240a) and later the Committee readmitted Mr. Minye for a twelve-week Summer session; however, no remarks whatsoever are reflected in the minutes of the Executive Committee Meeting specifying any sort of a probation or strict probation status. (Doerr Depn., 241a, 569a)

39. Dean Doerr seemingly admits that he told Mr. Minye that if he changed his appearance he could graduate and goes on to say that the grading system used is in place so that those kinds of personal criteria do not influence the grading but acknowledges that there is a human element that plays a factor in the Defendants' program. (Doerr Depn., 244a-246a)

40. Dean Doerr seemingly contradicts Dr. Kahler in that Dean Doerr says that Plaintiff could have been returned to live patients but he was not as a result

of a *combined* decision of the Operative Dentistry staff. (Doerr Depn., 247a-248a) However, Dr. Kahler testified that it was his decision along with Dr. Doerr's. (Kahler Depn., 370a, Lines 17-23)

41. Dr. Harry R. Pape, of the Operative Dentistry Department, testified that the only grades are on the computer cards and in his black book. (Pape Depn., 344a) However, his notes were turned in to Dr. Kahler (Pape Depn., 345a) and the computer cards of the instructors are also turned in to Dr. Kahler which ultimately go into the student file. (Pape Depn., 346a) Dr. Pape indicated that he used the standard grading system used by all instructors for evaluating student preparations on live patients and typodonts which consists of an R, S, T, V. The R being the best grade possible and the V being the worst grade possible. (Pape Depn., Ex. 6, 366a) The Deposition Exhibit 6 of May 24, 1978 indicates that a V rating in any category or three T ratings would result in failure of examination. Despite the grading system for clinical examinations, Dr. Pape declared that the same system would not apply for his daily evaluations and, indeed, he gave Mr. Minye three S's and one T for restoration work by Mr. Minye on June 21, 1977 and did in fact record a failure in his notebook for that restoration work. (Pape Depn., 347a, and Ex. 3, 365a)

42. Dr. Pape admits writting a memo to Dr. Kahler at the end of the summer of 1977 regarding Mr. Minye in which he indicates that he had not had much contact with Mr. Minye and cannot evaluate his present level of clinical ability. (Pape Depn., 363a, and Depn. Ex. No. 7, 367a) A note was written toward the end of the summer of 1977 and

given to Dr. Kahler, (Pape Depn., 362a). Thus, it would appear as though Dr. Kahler and Dr. Pape both attempted to explain that they did not wish to be responsible for grading Mr. Minye and firmly indicated that they both had not had sufficient contact with Mr. Minye to evaluate him for the summer of 1977.

43. Contrary to Dr. Pape's use of the R, S, T, V grading system, Dr. Heys indicates that he reviewed five finishes in seven cavity preparations on Mr. Minye's work and graded each one on the R, S, T, V system. He explains that the R is good or excellent, the S is satisfactory, the T is unacceptable and the V is failing. (Heys Depn. Tr. 7-8) On June 7 Dr. Heys had contact with Mr. Minye and evaluated two amalgams on teeth No. 4 and 5. He evaluated three R's and one T on one tooth and three R's and one S on another tooth. He goes on to say that he did not relate a grade like A, B, C, "but they were passable." (Heys Depn., Tr. 12-13) Is it not arbitrary for Dr. Heys to consider a T grade "passable" when Dr. Pape claims that a T grade on *daily* work was a failure? (Pape Depn., 347a-348a)

44. Dr. Heys acknowledges that tooth 23^2 was finished and he indicated so by punching the computer card corresponding to that tooth. (Heys Depn., 422a; Depn. Ex 9, 432a) However the grade sheet carried in the instructors' grade books for that particular assignment does not show any credit for the completion of tooth 23^2 (Depn. Ex. 5, 431a) It appears as though Dr. Heys indeed approved completion of tooth 23^2; however, Mr. Minye never received proper credit for such completion.

45. Dr. Margeson indicates that all instructors in Operative Dentistry had some input in the final determination of Mr. Minye's grade at

determination of Mr. Minye's grade at the end of the summer of 1977. (Margeson Depn., 399a) However, Dr. Kahler (Kahler Depn., 390a) and Dr. Pape (Pape Depn., 362-½a) indicated they had very little contact with Mr. Minye and could not evaluate his passability. In addition, Dr. Margeson then explained that he felt he couldn't contribute a grade on Mr. Minye at the end of the summer of 1977 because of his limited contact with Mr. Minye. (Margeson Depn., 404a) Again it appears as though no instructors were willing to take the responsibility for a failure. Could this be because he was pre-destined to fail and the underlings of Dr. Kahler did not want to participate in such a plan?

46. Dr. Sigurd P. Ramfjord, Chairman of the Periodontics Department, claims that Plaintiff was his student in the fall of 1976 and the summer of 1977. (Ramfjord Depn., 111a) However, he saw only one of Mr. Minye's patients on June 6, 1977 which was a significant clinical examination. He failed Mr. Minye on the examination. (Ramfjord Depn., 111a) This was the only contact that Dr. Ramfjord had with Mr. Minye and it coincidentally happened to be the incident where Mr. Minye allegedly "hacked up" the gums of the patient and tore the tissue. (Ramfjord Depn., 113a) However, after probing questioning, Dr. Ramfjord changed his rendition of the original examination and indicated that he in fact had not actually seen Mr. Minye "hacking" at the patient. (Ramfjord Depn., 114a) This incident was explored further by Plaintiff's counsel and revealed that the instructor on June 6, 1977 made a check of this patient before the

assignment to Mr. Minye based solely on records and a note appeared that the patient was accepted for treatment but "should be checked clinically." (Ramfjord Depn., 119a-121a) Thus, it appears once again Mr. Minye was given a patient who was susceptible to bleeding upon gentle probing and was told to perform a scaling procedure resulting in obvious bleeding which was observed by Dr. Ramfjord resulting in a severely negative report.

47. Dr. Fleszar, Periodontics Department, testified that he recalled that he made a statement to Mr. Minye as to the manner in which he was speaking for purposes of having Mr. Minye speak louder but denies "to the best of my knowledge" ever saying "speak English." (Fleszar Depn., 131a-134a)

48. Dr. Fleszar unequivocally states that he taught the summer session in Periodontics in 1977 and had given grades to Mr. Minye (Fleszar Depn., 129a-130a) but later indicates that he had no input in figuring the final grade. (Fleszar Depn., 137a)

49. Dr. Ainslie testified that Dr. Ramfjord, head of the Periodontics Department, or Dr. Nissle, chief instructor of Periodontics, told Dr. Ainslie to keep an eye on Mr. Minye for time used in clinic sessions during the summer of 1977. (Ainslie Depn., 142a) Dr. Nissle, in charge of the Periodontics Clinic in the summer of 1977, testified as to a formula that is normally used to determine a student's grade based on a curve of the entire group of students; however the formula was not used in the case of Mr. Minye but rather a staff determination was made because Mr. Minye was the only one in the summer of 1977 with special

status. (Nissle Depn., 87a-94a) However, this directly contradicts Dr. Ramfjord who said that the formula applied to Mr. Minye. (Ramfjord Depn., 112a, Lines 2-3) Thus, the question is raised as to exactly how Mr. Minye was evaluated during the summer of 1977 in Periodontics.

50. Dr. Nissle explained that it was expected that Mr. Minye would have final grades of a seven or above and pass the clinical examinations. (Nissle Depn., 96a-97a) However, this is in direct contravention of Paragraph 3, Pg. 2 of the CMP Supplement No. 8 which is an outline of the determination of semester clinic grades embodying the formula. The appropriate Paragraph 3 indicates in no uncertain terms that similar standards will be applied to all students whether they are juniors or seniors. A student will not be evaluated on the basis of his experience level, but rather on how well he attains the optimal goal. (Nissle Depn., 98a) Dr. Nissle goes on to explain that Mr. Minye's situation was different because he had two afternoons in Periodontics whereas most other students had one afternoon in Periodontics and three afternoons in Operative Dentistry. (Nissle Depn., 101a) Thus it appears as though Mr. Minye was graded by use of the formula *and* staff evaluation, whereas all others were graded on a formula only. (Nissle Depn., 101a) Thus, Mr. Minye, being the only alleged "special status" student in the summer of 1977 was evaluated differently from his classmates in the summer of 1977 in Periodontics.

51. Contrary to the foregoing testimony in the preceding paragraph, Dr. Nissle indicated that some students in Periodontics in the summer of

1977 were Seniors, some were holdovers just completing work they had started and some were on strict academic probation. (Nissle Depn., 105a, Lines 11-12) This would seem to contradict the testimony that Plaintiff was the only one with special status. (Nissle Depn., 94a) It appears as though Mr. Minye was either in a group of similarly situated students on strict probation or was in a special status peculiarly his own and had a special formula applied to his grading in Periodontics differently than all others.

52. Dr. Nissle indicates that the comparative printout indicated Mr. Minye's final average was 6.8 and that his clinical examination grade was not entered into the computer. (Nissle Depn., 104a) However, when adding in Mr. Minye's score of six on the clinical examination his average was 6.7 which would ordinarily be a D when using the ordinary curving method but the purpose of the staff meeting would be to determine whether it should be a D or an E and the staff resolved that it should be an E (Nissle Depn., 108a-109a) Thus it would appear Mr. Minye failed Periodontics because of his special status and his E grade was ultimately reported to the Executive Committee in conjunction with the Operative Dentistry grade which resulted in his ultimate dismissal despite the fact that he was a student in good standing with a 2.08 grade point which was above the 2.00 gradepoint required. (50a, Interrg. No. 3)

The foregoing rendition of events and circumstances surrounding Mr. Minye during his final months in the University of Michigan School of Dentistry Program are necessary to point out the substantial genuine issues of material fact raised by the Deposition Testimony, the contradictions between not only Mr. Minye and his instructors, but between instructors themselves, and the arbitrary, discriminatory, retaliatory and outright bad faith practiced by certain members of the staff who directly influenced Mr. Minye's grades submitted to the Executive Committee which ended his career. Certain of the foregoing facts or disputed facts were specifically pointed out to Judge Churchill in Plaintiff's Brief in Support of Plaintiff's Reply to Defendants' Motion for Summary Judgment and all of the remaining facts were available to Judge Churchill in Deposition form at the time of the Hearing of December 22, 1978. There is no denying that an analysis of Depositions, pleadings and exhibits, is tedious, and that was certainly recognized by Judge Churchill. However, complexity and volume cannot justify a failure of justice. The proper approach of Judge Churchill would have been to review the Deposition Testimony, or in the alternative, hold a hearing with representative witnesses who could satisfy the Court that either a genuine issue of material fact existed or did not exist. None of this occurred. Consequently, Mr. Minye was again denied a substantial right to "tell his side of the story" so that the District Court could at least exercise its discretion.

> "As the Supreme Court observed in *Adickes -vs- Kress and Company*, the Advisory Committee on the 1963 Amendments to Rule 56 expressly

rejected the idea that subdivision (a) altered the ordinary standards of proof in a Motion for Summary Judgment:

> 'Where the evidentiary matter in support of the Motion does not establish the absence of a genuine issue, Summary Judgment must be denied *even if no opposing evidentiary matter is presented.*'

398 US at 160, 90 S Ct at 1610 (Emphasis in original), quoting Advisory Committee notes on 1963 Amendment to Rule, 56." *Felix -vs- Young*, 536 F 2d 1126 at 1135 (1976). Also see *Poller -vs- Columbia Broadcasting System*, 368 US 464, 82 S Ct 486 (1961).

RELIEF REQUESTED

WHEREFORE, Leslie Minye, the Plaintiff and Appellant herein, respectfully prays that this Honorable Court reverse the Judgment and vacate the Order entered in the United States District Court for the Southern District of Michigan, Eastern Division, and remand for a hearing to determine whether there is any geniune issue of material fact or for Trial.

Respectfully submitted,

STEVEN STELMACH, JR. (P24866)
Attorney for Plaintiff and Appellant
2970 East Big Beaver Rd.
Troy, Michigan 48084
Telephone: (313) 689-5696

Dated: January 4, 1980

APPENDIX I

State of Michigan

ATTORNEY GRIEVANCE COMMISSION

IN RE: DAVID H. FRIED File # 37569

The file involving Leslie Minye was originally opened by one of the partners at another office that we have and was sent to me for handling.

I am at somewhat of a disadvantage in making a full response for the reason that I have no file left other than a few personal notes and a payment schedule, as I received a letter, a photostat of which is attached, whereby I turned over the entire file that I had to Mr. Minye.

Basically, his claim was against the University of Michigan Dental School based on the premise that he had been denied his Constitutional Rights in being expelled from the School while in his senior year.

The facts, by recollection, were that he entered the School, after having majored in German Literature as an undergraduate. He was suspended from class for one semester for failure of certain classes. He was allowed back in School, but then was compelled to work on models, rather than patients, because of questionable methods, techniques and practices. Subsequently, he was dismissed from the School, he filed an "appeal" to the Dean of the University, he was reinstated, allowed to attend the summer semester, failed those courses, and then was removed from the School without the opportunity to return.

It was at this point that the lawsuit was started for him.

Among other things, by way of preliminary discovery, defendant sought information as to what plaintiff had by way of expert testimony. Plaintiff indicated that a classmate's father-in-law, a dentist, looked over some of plaintiff's work, and would testify in his behalf. One evening, I met with the proposed witness, and plaintiff. In talking with him, it was clear that, should he be called as a witness, he would end up hurting plaintiff's case, more than helping him.

We then attempted to find an expert, a dentist, but one not from this area, because of the great influence which the University of Michigan has in this State.

With some contacts, I was able to find a dentist in Maryland, and one in California. Plaintiff interviewed with both. The one in Maryland would not have testified in plaintiff's behalf. The one in California ultimately indicated that he would.

It should be pointed out that the testimony that would be used from this expert would be testimony that we would need in our case in chief for the purpose of proving, or attempting to prove, the denial of the Constitutional Rights of this plaintiff. It is not, in my judgment, something that is brought out at the time of initial discovery, but is rather a trial tool and something to be used as a trial tool.

Further, there was the claim by Plaintiff's teachers as to his relationship and conduct with certain patients at the School. An investigator was hired for the purpose of obtaining a statement from patients to see what, factually, they would say as it relates to their relationship with plaintiff. This was acquired and made part of the file.

Again, from a tactical standpoint, it was my judgment that these people not be brought in during the discovery process, as all it would do would be to alert the defendant and all of the instructors, as to what one of our points of attack would be.

Among other things depositions were taken of virtually all of plaintiff's instructors. In addition, the Assistant Dean of the Dental School deposition was taken. There were a total, apparently, of fifteen (15) depositions taken and these were taken over a period of several days. In addition, plaintiff's deposition was taken and this lasted one complete day.

The case was progressing in an orderly fashion, and plaintiff indicated his unhappiness with the slowness of the progress of the case. A Motion to Advance was filed with the court, and among other things, defendant responded by claiming that the defendant would be filing a Motion for Summary Judgment, and asked the court to withhold ruling on the Motion to Advance until such time as defendant could file its Motion for Summary Judgment.

Defendant did file the Motion for Summary Judgment, a responsive brief was filed, oral argument was had on two separate occasions before the Trial Judge, and, ultimately, the Trial Judge ruled that as a matter of law, there can be no claim brought against a University, that a court does not want to become involved with the internal proceedings of schools and universities.

There is a substantial body of law which substantiates this position. It was plaintiff's claim that the above may be true, but does not apply when there is invidious discrimination by the school against the student; which would, of course, be a question of fact, and which could only be shown at the time of trial, because it would be for the trier of the fact to make such a determination.

By memory, the Trial Judge did not respond to that part of plaintiff's claim, but merely said that case law is such that courts do not meddle in the internal affairs of universities.

When the Trial Judge rendered his opinion, it was within a matter of days that plaintiff received the letter of dismissal, attached hereto.

Respondent can only reiterate that as a matter of tactic, the disclosure, or reducing to testimony, of the dentist in California was something that should be pursued at the time of trial, rather than in discovery stage. Further, as a matter of tactic, the bringing in of the several witnesses and causing their depositions to be taken, or obtaining affidavits from them, would be erroneous to the case. As a matter of fact, the affidavits which Mr. Minye makes reference to could not be introduced in any event. The only thing which could be done would be to take their depositions, and to have their depositions as a matter of record.

A substantial amount of work was done in behalf of plaintiff. He always seemed pleased, and satisfied, with the work which was done for him by this office. It seems that when the Court of Appeals in Cincinnati sustained the trial court, he felt it necessary to pursue this tact with the Grievance Board. Up until receiving of this Grievance, Mr. Minye has always indicated and stated to me that he felt his case was being handled in an exemplary fashion.

We even had a telephone conversation approximately two months ago, where, again, he stated that he felt that his case had been handled in a proper fashion by this office, that he was unhappy with his new attorneys, and that he switched attorneys at the insistence of his father, who has paid all of his bills as it relates to this litigation, because his father was unhappy with this office for the reason that we didn't spend a sufficient amount of time on the telephone talking with his father.

Whether this is true or not, I cannot state. All I can say is that this was what was said on the telephone.

Leslie Minye has not only been emotionally involved in his lawsuit, which he has a right to be, but, apparently, it has caused him to devote substantially all of his waking hours to finding ways and means by which he is attempting to get back into the University of Michigan Dental School.

I believe there were several opportunities for him to enter other dental schools, which rationally, should have been accepted. Then, the University of Michigan, could have been put behind him. However, he chose, and chooses, to pursue the University of Michigan matter, and those things related to it.

As far as the costs are concerned, I have always given a full and complete breakdown to Leslie Minye. What he fails to state to the Bar Grievance Committee is the cost of the investigation for the taking of statements from the patients, the costs of purchasing the transcripts, and various other miscellaneous costs. Other than the original retainer, my relationship with Mr. Minye from an attorney fee standpoint was that payment would be on an hourly basis, and records were kept as to the amount of time that was spent on this case. There were close to $5,000.00 in costs which were expended by this office, and for which reimbursement was obtained from Mr. Minye. There were numerous telephone conversations with both, Leslie Minye and his father, which were not even made as part of the time expended on his file.

Respondent states that he acted in a diligent and proper and ethical manner as it relates to the care and treatment and handling of the claim of Leslie Minye and denies any misconduct of any kind.

Respectfully submitted,

/s/ DAVID H. FRIED, P-13709

Dated: November 16, 1979
Detroit, Michigan

APPENDIX J

LETTER

Gentlemen:

Mr. Leslie Minye has asked me to write to you regarding his application for admission with advanced standing to your School.

As you will note in reviewing his transcript, he was dismissed from this School at the end of the first term of his senior year because of E grades in clinical operative dentistry and periodontics. You will note, also, that he repeated the second term of his first year in order to remove a deficiency in oral pathology. Prior to receiving the two E grades in clinical subjects, he had received a deficiency grade in only one related area, namely, partial denture.

I feel that Mr. Minye's background makes it difficult for him to communicate effectively with people. Furthermore, this lack of communication is to a significant degree responsible for many of his academic problems. He is a complex young man, with many personal concerns regarding his family. To what extent his different personality influences his clinical evaluation I am not sure, but it is my opinion that the potential exists.

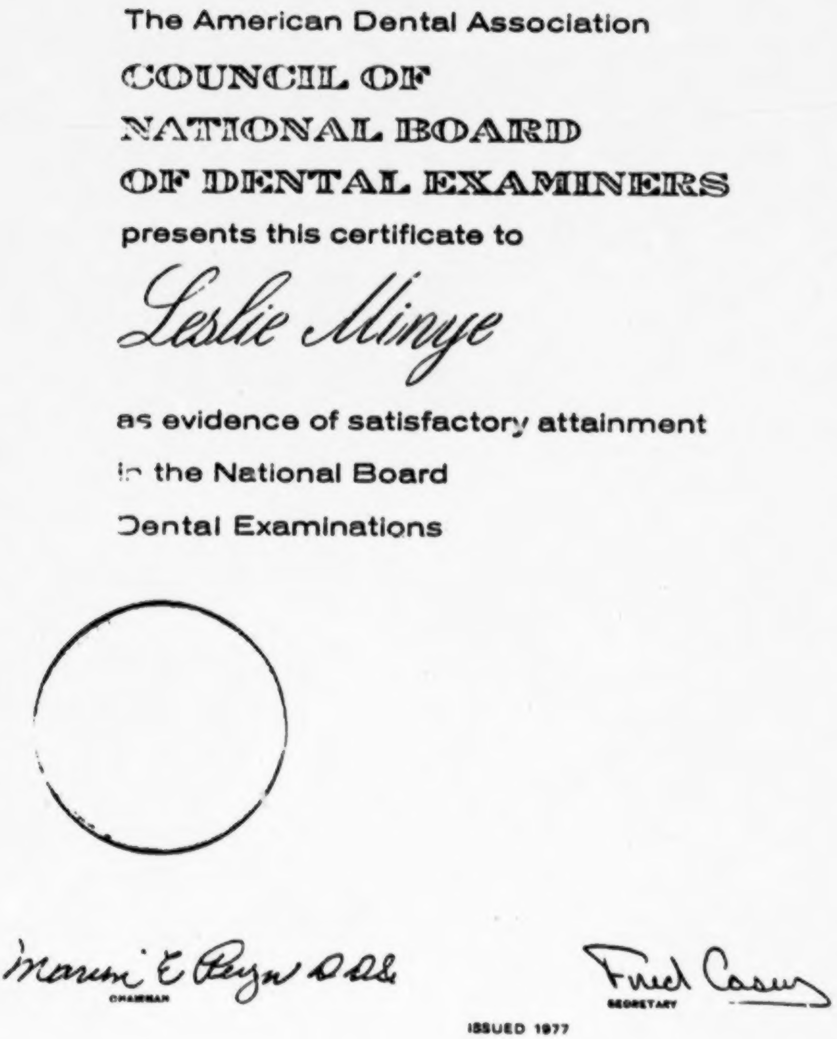
I know that Mr. Minye is deeply desirous of becoming a dentist. He tells me that he believes he can put family pressures aside and concentrate on his dental program. It is quite possible that a new environment would be more conducive to his progress. I hope that you will give his application for admission with advanced standing your serious consideration.

Sincerely yours,

Robert E. Doerr, D.D.S.
Associate Dean

RED:cr

APPENDIX K



The American Dental Association

COUNCIL OF
NATIONAL BOARD
OF DENTAL EXAMINERS

presents this certificate to

Leslie Minye

as evidence of satisfactory attainment
in the National Board
Dental Examinations

Marvin E Reyn D.D.S.
CHAIRMAN

Fred Casey
SECRETARY

ISSUED 1977

PART 1

MINYE LESLIE	750462	A75	77	79	86	78	80
	REFERENCE NUMBER	EXAMINATION DATE	ANATOMIC SCIENCES	BIOCHEM PHYSIOLOGY	MICROBIOLOGY PATHOLOGY	DENTAL ANATOMY	AVERAGE

PLEASE USE THE REFERENCE NUMBER
IN ALL COMMUNICATION WITH THE NATIONAL BOARD

PART 11

77	MICH	D76	77	83	75	81	83	81	79	80
GRADUATION	SCHOOL	EXAMINATION DATE	OPERATIVE DENTISTRY	PHARMACOLOGY	PROSTHODONTICS	ORAL SURGERY ANESTHESIA	ORTHODONTICS PEDODONTICS	ORAL PATH RADIOLOGY	ENDODONTICS PERIODONTICS	AVERAGE

NATIONAL BOARD OF DENTAL EXAMINERS
211 EAST CHICAGO AVENUE
CHICAGO, ILLINOIS 60611

FINAL REPORT

CANDIDATE HAS PASSED ALL NATIONAL BOARD DENTAL EXAMINATIONS

APPENDIX L

LETTER

KELLY
HEALTH CARE

November 13, 1978

TO WHOM IT MAY CONCERN:

Leslie Minye gave good care and we received several positive comments about his performance. Extremely reliable and we would rehire.

Sincerely,
KELLY HEALTH CARE

/s/ George D. Morin
Nursing Supervisor

GM/ls

APPENDIX M

LETTER

WEST DENTAL LABORATORY
9333 Lilley Rd.
Plymouth, Michigan 48170
Phone 459-7878

Plymouth, April 28, 1979

Sharp Dental Laboratory
3145 Professional Drive
Ann Arbor, Michigan 48103

Gentlemen:

This is a recommendation relative to Mr. Leslie Minye's work experience and performance as a dental technician who is now seeking employment at your laboratory.

Mr. Leslie Minye had worked full time (40 hours or more) in the West Dental Laboratory from October 1977 until April 1979.

Since he was not a certified dental technician per se, we hired him only after he proved to be knowledgeable in our specialty. I soon became aware that he was independently and in an exemplary manner completed the prescriptions for gold and bridge assignments. His work had fully satisfied my doctor clients' desired standards. My clients were faculty members at the University Of Michigan Dental School, or, worked as private practitioners.

It was to my surprise, when Mr. Minye had performed very good work in our laboratory for over one year, that one of my faculty dental clients expressed a sudden dissatisfaction or concern about Mr. Minye's presence or employment in the West Dental Laboratory. The very same issue was expressed to my former colleague, Mr. Cornel Tripon, now a Senior Dental Student.

Knowing Mr. Minye's unfortunate situation and his circumstances thereafter at the dental school, it is my assumption that the associate of my doctor's client, Dr. Kahler, who also was a faculty at the University of Michigan Dental School, could well have instigated or provoked and have such gesture expressed in order to prevent Mr. Minye from further working in the laboratory. I cannot see any other motives, since Mr. Minye had satisfied the very same doctors' demands in the past, and I had already been working for the very same doctors for several years, with complete satisfaction on their part. I saw no reason why Mr. Minye should not continue his good work at our laboratory to my doctor clients; he was organized, very precise and responsible. But when the same faculty client began returning the completed work, I went over extra carefully on each and every unit. I just could not find and identify anything wrong with them; and I have been in this business for over 20 years now.

These returns eventually became so customary that eventually Mr. Minye himself realized that his presence is gradually causing my business to deteriorate. After I talked this matter over with Mr. Minye, it was his decision then to leave the laboratory and look for other employment.

I want to reemphasize that Mr. Minye had performed very well as a technician in gold and related areas. I am not in the position to comment on Mr. Minye's ability on processing partial and complete dentures, because our laboratory specialized only in gold and bridge work as well as porcelain. We do not accept prescriptions for anything else. At the beginning Mr. Minye told me that his knowledge in these two areas were very limited. (In dental school he was taught only the wax-up part of dentures.)

I most certainly would recommend Mr. Minye for hiring. It depends on your discretion whether Mr. Minye's limited experience would satisfy your needs. Should you need further my assistance, please contact me at your convenience at 459-7878.

Sincerely yours,

WEST DENTAL LABORATORY
9333 Lilley Rd.
Plymouth, Michigan 48170
Phone 459-7878

/s/ Jozsef Lengyel, CDT

CC:JL

APPENDIX N

LETTER

DURANT & DURANT, P.C.
ATTORNEYS AND COUNSELORS
2300 PENOBSCOT BUILDING • DETROIT, MICHIGAN 48226
TELEPHONE 961-6800

April 13, 1979

Mr. Leslie Minye
2200 Fuller, # 604-B
Ann Arbor, MI 48105

Dear Mr. Minye:

You have offered to retain us in connection with the preparation and possible filing of a motion to reconsider in Minye v University of Michigan, et al., No. 77-2421, in the U.S. District Court for the Eastern District of Michigan, Southern Division.

We accept such offer of retainer, subject to the following terms and conditions:

1. You retain and employ us to take such legal action as may, in our judgment, be advisable in your best interests, the right to settle and/or compromise the matter, and the right to institute legal action. It is understood that whenever possible we will consult with you before making such decisions, but we have the right to make them without consulting you if, in our judgment, the situation requires an immediate answer and you are not available.

2. We shall receive as our fee the sum of $3,000.00, payable immediately.

3. No other fee shall be charged by us for our services. However, out-of-pocket costs which we incur on your behalf (including, but not limited to, court costs, discovery costs, reasonable personal travel expenses in connection with your representation, and the costs of any techinical experts or investigators) will be paid for by you within 30 days of being billed therefor, unless we in writing ageree to extend such a period of time. We agree to consult with you before expending any sum over $100.00 on such out-of-pocket costs in this matter.

4. In anticipation of such costs, you agree to pay us in advance the sum of -0- and to maintain a credit balance of this amount with us continually. Any unused portion of this amount at the conclusion of our representation of you in this matter will, of course, be refunded to you.

5. We, in our discretion, may employ medical or other experts, associate counsel, investigators or others, who shall report exclusively to us, and whose fees may be advanced by us and charged against the costs to be paid by you in accordance with the preceding paragraphs.

* * *

7. We shall have the right to withdraw from representation of you in this matter if, in our judgment, you fail to cooperate with us, or fail to pay us either our fee or the out-of-pocket costs which we have incurred on your behalf, in accordance with the provisions of the preceding paragraphs. In such case, the time we have expended in representing you shall be calculated at the rate of $100 per hour; this sum shall be subtracted from the flat fee provided for in Paragraph 2, above; any

balance due us on account of out-of-pocket costs not paid for shall then be subtracted from this result; and the balance, if any, shall be refunded to you.

8. You retain the right to discharge us as your attorneys for any reason whatsoever, at any time. However, if you should do so before we have finished our representation of you in this matter, you agree to pay us in full for all out-of-pocket costs which we have incurred up to that point, plus reasonable costs to be incurred formally to withdraw our appearance on your behalf. In the event that you do discharge us, you agree that no portion of the fee specified in Paragraph 2, above, need be refunded; and if such fee has not been paid for in full, you agree to complete the payment at once.

9. In the event that we either withdraw, or you discharge us, you agree that we shall have a lien upon all papers or property in our possession, no matter of what the nature, until we have been paid in full, both for fees and for out-of-pocket costs.

10. We make no warranties or guaranties or representations concerning the successful termination of this matter, or the successful termination of this matter, or the favorable outcome of any legal action which may be involved, nor do we warrant or guarantee that we will obtain any reimbursement for you. We do, however, agree to act as your attorneys in this matter and to perform, or cause to be performed, to the best of our ability all of the services necessary for your proper representation in this matter.

11. Additional conditions for this retainer are:

At this stage in our attorney/client relationship, we are under no obligation whatsoever beyond the preparation of the material necessary to file a motion to reconsider the judgment of summary judgment in favor of the defendants in this matter, such motion to be ready on or before April 24, 1979, and a consultation with you concerning the work that has been done on the case by us, and our estimate as to what should be done in the future and how much this will cost. Other than that, we have no obligation whatsoever.

Subject to the foregoing we accept your offer of retainer.

If this letter is in accordance with your understanding of our agreement, I would appreciate it if you would sign where indicated below and return the original to me in the envelope enclosed. The copy of the retainer letter, also enclosed, should be kept by you for your records.

If you have any questions, please contact me as soon as possible.

Sincerely yours,

/s/ Richard Durant

Accepted this 13th day of April, 1979

Leslie Minye
Social Security No.

Supreme Court, U. S.
FILED
OCT 30 1980
MICHAEL RODAK, JR., CLERK

No. 80-395

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LESLIE MINYE,

Petitioner,

v.

UNIVERSITY OF MICHIGAN, REGENTS OF THE UNIVERSITY OF MICHIGAN, EXECUTIVE COMMITTEE OF THE SCHOOL OF DENTISTRY OF THE UNIVERSITY OF MICHIGAN, AND SCHOOL OF DENTISTRY OF THE UNIVERSITY OF MICHIGAN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETER A. DAVIS

Attorney of Record for
Respondents
320 North Main Street, Suite 400
Ann Arbor, Michigan 48104
(313) 995-0066

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

COUNTER-STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

In this civil rights action which claims that the University of Michigan discriminated against plaintiff in dismissing him from Dental School after he failed, repeated and failed for a second time two essential clinical courses, did the Court of Appeals for the Sixth Circuit properly affirm the District Court's granting of summary judgment in favor of defendants, entered after finding on the basis of exhaustive discovery that:

(a) Plaintiff presented no evidence that defendants were arbitrary and capricious in their dismissal of the plaintiff from Dental School, nor did plaintiff present any evidence in support of his Complaint.

(b) Defendants presented documents clearly showing that plaintiff was not denied due process under the 14th Amendment and that the defendants did not dismiss plaintiff in an arbitrary or capricious manner.

(c) The procedure followed by the University of Michigan for dismissal of plaintiff in this case satisfied the requirements of *Board of Curators* v. *Horowitz*, 435 US 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-395

LESLIE MINYE,

Petitioner,

v.

UNIVERSITY OF MICHIGAN, REGENTS OF THE UNIVERSITY OF MICHIGAN, EXECUTIVE COMMITTEE OF THE SCHOOL OF DENTISTRY OF THE UNIVERSITY OF MICHIGAN, AND SCHOOL OF DENTISTRY OF THE UNIVERSITY OF MICHIGAN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

COUNTER-STATEMENT OF THE CASE

I. NATURE OF THE CASE

Plaintiff's single-count Complaint is essentially based upon 42 USC 1983 and 1985. (7a) * The case arises out of plaintiff's matriculation at and dismissal from the University of Michigan Dental School. Unlike students of other schools, Dental School and Medical School students must take certain courses and must pass all courses taken. (248a-249a) The plaintiff in this case was in academic trouble during most of his three years at the University of Michigan Dental School and frequently was on probation. (55a-56a) In his first year he failed Oral Pathology twice, was placed on probation and finally dropped for poor scholarship following a hearing before the Executive Committee. (*Ibid.*) Upon readmission on probation he failed Operative Dentistry and Periodontics and again was dismissed following a hearing. (*Ibid.*) Upon readmission upon strict probation he repeated the two courses which he failed previously and failed both of them a second time. (*Ibid.*) He was again dismissed from the Dental School and thereafter brought this action. (*Ibid.*)

II. THE PROCEEDINGS BELOW

On October 6, 1977, plaintiff filed his Complaint against the University of Michigan, its President and officials and faculty of the School of Dentistry. (7a) The heart of plaintiff's Complaint was contained in a single paragraph (9a), which read as follows:

> 15. That upon entry into his senior year, Plaintiff was accused of and discriminated against because:
>
> A. He was accused of being unable to perform certain tasks which were accomplished satisfactorily in his lower classes;

---

* Refrences are to the Joint Appendix on appeal to the Sixth Circuit. Petitioner has not yet requested that the record in that Court be certified and transmitted.

B. Accused and charged with incompetence on a subjective basis;

C. Being dirty i.e. in need of a bath;

D. Having long hair which was improper for a dentist;

E. Having facial hair which was improper for a dentist;

F. Being foreign born;

G. Speaking with a foreign accent;

H. Accusing Plaintiff of having an aggressive personality with a documented psychiatric problem;

I. Having the wrong attitude in dentistry;

J. In being too interested in passing his course;

K. In not working on patients;

L. Falsely accused of performing certain work in an improper manner;

M. Accused by certain members of the faculty as being "unteachable".

Defendants promptly answered plaintiff's Complaint and set forth the following matter in paragraph 15 of their Answer (27a-28a):

> 15. The allegations contained in paragraph 15 are denied as untrue in the manner and form alleged, except that a dental student's personal habits and appearance are proper subjects for regulation because patients are treated in clinical courses. Such regulations were at all times published in the Clinic Procedure Manual, a copy of which

> was given to each student, including plaintiff. Pertinent to paragraph 15 of plaintiff's Complaint, a copy of Parts I, II and III of the current Manual is annexed hereto as Exhibit A (7 pages). Further answering, defendants aver that plaintiff was dismissed from the School of Dentistry for poor scholarship as a result of plaintiff's receiving failing grades in Senior Operative Dentistry and Periodontics. A copy of a letter explaining to other dental schools why plaintiff was dismissed from the University of Michigan Dental School is annexed hereto as Exhibit B (1 page).

Thereafter, extensive discovery was undertaken and completed by both sides. The plaintiff himself was deposed for a full day. Following plaintiff's deposition, and over a period of three full days, the plaintiff's attorney deposed nearly every administrator or faculty member of the University of Michigan School of Dentistry who had any contact with or knowledge concerning the plaintiff. In all, 15 depositions were taken.

These depositions were not limited in scope, totaled nearly 1,000 pages of testimony and were supported by numerous exhibits. In addition, plaintiff requested and received hundreds of documents (including those at 535a-575a, the documents relied on in defendants' Supplemental Brief to the District Court) constituting substantially the complete files pertaining to plaintiff's enrollment, probation and dismissal from the University of Michigan School of Dentistry.

Upon completion of discovery, defendants moved for summary judgment (434a) and the District Court held a hearing on December 22, 1978. (480a-523a) After entertaining oral argument, the court took defendants' Motion under advisement but requested supplemental briefs from both sides on the issue whether plaintiff was accorded due process in being dismissed from the Dental School. (521a)

In an undated supplemental brief[1] filed sometime in January of 1979, plaintiff quoted from deposition testimony and attached Minutes of the Executive Committee meetings of the School of Dentistry to show that plaintiff was dismissed from the Dental School after the members of the Executive Committee were polled by telephone to see whether they would affirm or reaffirm their previous action to dismiss the plaintiff. Plaintiff then stated that "plaintiff feels * * * that there is a clear showing of arbitrary and capricious conduct by the Dental School and by the instructors in the Dental School as it relates to plaintiff." However, plaintiff went on to assert that "[p]laintiff can, and will, indicate to the court, should the court desire, by making reference to the depositions which were taken of these various individuals of the arbitrary action. If and when the court requests this it shall be done forthwith." Notwithstanding that the court had specifically requested supplemental briefs on the due process issue, plaintiff did not make any argument supporting his assertion that the above-mentioned telephone poll violated the due process clause.

Defendants filed with the district court on February 6, 1979, 30 exhibits concerning plaintiff's matriculation at the University of Michigan School of Dentistry. (535a-575a) These exhibits were presented to the district court with the following identification and analysis (*Ibid.*) :

---

[1] Plaintiff's brief was not included in the Joint Appendix but was part of the record on appeal to the Sixth Circuit.

Date	Event and Exhibit	Commentary
08/30/72	Admitted to Dental School	Mr. Minye was admitted even though his Dental Admission test scores were very low in the two manual areas of spatial relations and carving dexterity, which would serve as an indicator of future difficulty in clinical work. See *Defendants' Answers to Plaintiff's First Interrogatories* (Interrogatory No. 5) dated February 17, 1978.
05/11/73	Notification of deficiency in Preclinical Dentistry Exhibit 2 [537a]	Personally received by Mr. Minye on May 11, 1973.
05/30/73	Failure of Oral Pathology — *placed on probation* Exhibit 3 [538a]	Mr. Minye was advised of the procedure necessary to continue in the Dental School.

Date	Event and Exhibit	Commentary
08/06/73	Conference with Mr. Minye Exhibit 4 [539a]	Personal conference where re-examination procedure was explained to Mr. Minye.
08/13/73	Failure of Oral Pathology for the second time Exhibits 1, 4, 5 [535a, 539a-540a]	Also failed to keep appointment to discuss test result.
08/27/73	Conference with Mr. Minye Exhibit 4 [539a]	Procedure explained to him and referred to Dean Doerr.
08/31/73	*Hearing before Executive Committee* Exhibit 6 [541a]	Mr. Minye appeared before the Executive Committee. The Committee talked with him and recommended that he withdraw from School.
08/31/73	*Dropped from Dental School for poor scholarship* Exhibit 1 [535a]	Following hearing before Executive Committee.

Date	Event and Exhibit	Commentary
09/73	Conference with Mr. Minye [Exhibit 7 [542a]	Associate Dean Doerr advised Mr. Minye of his rights.
09/17/73	Letter to Mr. Minye Exhibit 7 [542a]	Confirmation of conversation with Associate Dean Doerr who advised Mr. Minye of procedure for readmission.
01/74	Re-enrolled in Dental School Exhibits 1, 7 [535a, 542a]	Status as second term, first year student.
08/27/75	Deficient work in clinical courses Exhibit 1 [535a]	Inadequate grades received in Community Dentistry, Endodontics and Operative Dentistry, later changed to passing grades.
01/09/76	*Placed on probation* Exhibit 8 [543a]	Executive Committee acted on basis of scholastic records.

Date	Event and Exhibit	Commentary
01/14/76	Conference with Mr. Minye Exhibit 9 [545a]	Mr. Minye advised in writing of his probationary status and advised of procedure to continue in the Dental School.
08/26/76	Executive Committee meeting Exhibit 10 [546a]	Committee decided to request Mr. Minye to meet with them as soon as possible.
08/31/76	Letter to Mr. Minye Exhibit 11 [547a]	Mr. Minye invited to meet with Committee on 9/10/76.
09/10/76	*Hearing before Executive Committee* Exhibit 1, 12 [535a, 548a]	Having been advised by letter (Exhibit 11) that he had the right to first meet with the Dean personally, Mr. Minye met with the full Executive Committee and had a hearing concerning his probationary status.

Date	Event and Exhibit	Commentary
09/15/76	Letter to Mr. Minye Exhibit 13 [549a]	Mr. Minye advised that he was on strict academic probation and the consequences of that status were explained to him in writing. He was advised to make an appointment to see the Associate Dean "at the earliest time that is mutually convenient." Further advised that the University was "anxious to assist in an improvement of your academic progress."
09/20/76	Request of Dental School Dean Exhibit 14 [550a]	Dean Mann's request of faculty that fourth-year students in academic difficulty receive counseling.
10/06/76	Report of Operative Dentistry Department Exhibit 14 [550a]	Dental School Administration advised that Mr. Minye would receive counseling.

Date	Event and Exhibit	Commentary
10/19/76	Conference with Mr. Minye Exhibit 15 [551a]	Dr. Kahler of Operative Dentistry Department met with Mr. Minye and "discussed rather thoroughly" the reasons for his failure of the Senior Clinic in Operative Dentistry and noted that "past discussions" had been had.
11/15/76	Report from Periodontics Department Exhibit 16 [552a]	Associate Dean Doerr advised by Periodontics Department that Mr. Minye produced the poorest quality work of all of the students having difficulty in Periodontics.
11/16/76	Report from Operative Dentistry Department Exhibit 17 [553a]	Associate Dean Doerr advised by Operative Dentistry Department that Mr. Minye's work was so poor that he should be removed completely from patient contact in order to protect patients.

Date	Event and Exhibit	Commentary
01/07/77	*Dismissal from Dental School* Exhibit 18 [554a]	Executive Committee routinely considered scholastic records of all students and dismissed Mr. Minye (and others) from the Dental School.
01/13/77	Conference with Minye [52a-53a]	Dean Doerr met with Mr. Minye and offered him an opportunity to meet with Executive Committee on January 21, 1977, to appeal his dismissal from Dental School. See *Defendants' Answers to Plaintiff's First Interrogatories* (Interrogatory No. 9) dated February 17, 1978.
01/17/77	Letter from Mr. Minye Exhibit 19 [556a]	Acknowledgement by Mr. Minye of emotional and academic problems and request for readmission to the Dental School.

Date	Event and Exhibit	Commentary
01/17/77	Conference with Mr. Minye [53a]	Dean Doerr met with Mr. Minye again. See *Defendants' Answers to Plaintiff's First Interrogatories* (Interrogatory No. 9), dated February 17, 1978.
01/21/77	*Hearing before Executive Committee* Exhibit 20 [559a]	Mr. Minye was given a hearing before the Executive Committee to appeal his dismissal and "after a lengthy discussion the Committee reaffirmed its position for dismissal."
01/25/77	Letter to Mr. Minye Exhibit 21 [560a]	Written advice to Mr. Minye that the Executive Committee reaffirmed its previous decision to dismiss him from school. Mr. Minye was advised that he could talk further with the Associate Dean "at any time you desire."

Date	Event and Exhibit	Commentary
02/11/77	Executive Committee meeting Exhibit 22 [561a]	Executive Committee noted that Mr. Minye "apparently was preparing another appeal."
02/22/77	Letter from Mr. Minye Exhibit 23 [562a]	Petition for readmission and request for personal appearance before the Executive Committee on a rehearing. *This document clearly shows that Mr. Minye knew of his rights.* As appears from Associate Dean Doerr's sworn answer to Interrogatory No. 9, Mr. Minye personally delivered this letter to Dean Doerr and numerous personal conferences were had with Mr. Minye whereat the procedure was explained to him. See *Defendants' Answers to Plaintiff's First Interrogatories* dated February 17, 1978. See also *Doerr Deposition,* pp. 15-17, 23-24 and 35-42.

Date	Event and Exhibit	Commentary
02/25/77	Meeting of Executive Committee Exhibit 24 [568a]	Associate Dean of the Dental School advised Executive Committee that the Dental School administration had received a telephone call from Dr. William Cash, Assistant to the President of the University of Michigan, concerning the dismissal of Mr. Minye. No action was taken by the Executive Committee.
02/25/77	Conference with Mr. Minye [53a]	Dean Doerr again met with Mr. Minye and explained position of Executive Committee and advised Mr. Minye that no new evidence was presented to justify reconsideration. See *Defendants' Answers to Plaintiff's First Interrogatories* dated February 17, 1978.

Date	Event and Exhibit	Commentary
03/21/77	Conference with Mr. Minye [53a]	Dean Doerr met again with Mr. Minye. See *Defendants' Answers to Plaintiff's First Interrogatories* dated February 17, 1978.
04/08/77	Meeting of Executive Committee Exhibit 25 [569a]	*Committee voted to readmit Mr. Minye on strict probation under a specific program of study.*
04/12/77	Conference with Mr. Minye [53a]	*Dean Doerr met with Mr. Minye and explained action of Executive Committee in readmitting him on strict probation. Mr. Minye was advised that another failing grade would result in dismissal from school with no further recourse. Mr. Minye acknowledged that he understood this condition.* See *Defendants' Answers to Plaintiff's First Interrogatories* dated February 17, 1978.

Date	Event and Exhibit	Commentary
05/02/77	*Readmitted on strict probation* Exhibit 1 [535a]	Readmitted under strict probation and notation made on official transcript. See *Defendants' Answers to Plaintiff's First Interrogatories* dated February 17, 1978.
07/19/77	Meeting of Executive Committee Exhibit 26 [570a]	Letter of Mr. Minye was read to Executive Committee.
08/04/77	Letter to Mr. Minye Exhibit 27 [571a]	Letter from President of the University to Mr. Minye advising him that he could complain to the Dean's office or to the Office of Student Services in the Michigan Union. (Copy of Mr. Minye's letter is attached to the original transcript of his deposition as Exhibit No. 2).
08/18/77	Meeting of Executive Committee Exhibit 28 [572a]	Committee again reviewed the academic records of Mr. Minye.

Date	Event and Exhibit	Commentary
08/23/77	Vote of Executive Committee Exhibit 29 [574a]	Committee was polled by telephone on August 23 and 24 concerning the academic record of Mr. Minye and voted unanimously to confirm its earlier decision to dismiss him from the school because of his scholastic record.
08/23/77	Letter to Mr. Minye Exhibit 30 [575a]	Mr. Minye advised in writing that the Executive Committee decided to dismiss him from the Dental School based upon his failure for the second time of two clinical courses (Operative Dentistry and Periodontics) which he repeated in a special Summer program. Mr. Minye was advised that he could speak with the Dean if he thought he could be of assistance in any way.

As noted above, the documents and brief submitted by defendants were requested by the District Court (521a). In response, plaintiff filed a three-page Reply to Defendants' Brief Re Due Process Issue where plaintiff merely asserted that "certain statements and 'commentary' included in defendants' pleading" were disputed by plaintiff, but plaintiff failed to state in what way they were disputed and plaintiff failed to challenge or contest a single document submitted to the District Court. Plaintiff did state that he would not "alter his opinion that [discrimination] has occurred."

On April 4, 1979, District Judge James P. Churchill handed down a Memorandum Opinion (576a) granting defendants' Motion for Summary Judgment. An Order (577a) and Judgment were entered pursuant to the Opinion on April 5, 1979. (578a)

Plaintiff appealed (579a) to the Court of Appeals for the Sixth Circuit, which affirmed the Judgment of the Eastern District of Michigan, Southern Division. Plaintiff now petitions this Court for a Writ of Certiorari.

ARGUMENT

I. PLAINTIFF COMPLETED HIS DISCOVERY BUT WAS UNABLE TO PRESENT ANY EVIDENCE TO SUPPORT THE ALLEGATIONS CONTAINED IN HIS COMPLAINT.

It cannot be too strongly emphasized that plaintiff was accommodated every way possible in the exercise of discovery. Every shred of paper relating to plaintiff was produced by the defendants and the entire faculty of the Dental School was made available for deposition. Plaintiff's attorney deposed 14 of plaintiff's professors and the depositions themselves lasted for three full days.

Plaintiff had over seven months after the conclusion of those depositions, and before the District Court ruled, to conduct additional discovery or to submit documents supporting the contentions made in his Complaint. He was unable to do so, and paragraph 15 of the Complaint was without evidentiary support. The most that plaintiff has been able to produce is the assertion in plaintiff's Supplemental Brief filed in January of 1979 that "plaintiff feels * * * that there is a clear showing of arbitrary and capricious action" by the defendants.

On appeal, plaintiff listed 50 "issues of fact" which he claimed should have prevented summary judgment. (Petition for Writ of Certiorari, at 23.) None of these were argued to the District Court, and even if they had been they would not have raised genuine issues of fact.

The law requires more than a feeling, it requires evidence. *Appolonio* v. *Baxter,* 217 F.2d 267 (6th Cir. 1954). The plaintiff would contend that he is allowed to have a trial to support the "mere hope" that evidence will turn up to support some of his claims. *Id.* at 271.

In *First National Bank* v. *City's Service Co.,* 391 US 253, 20 L.Ed. 2d 569 (1968), this Court affirmed the Second Circuit's decision affirming a district court's grant of summary judgment for the defendants. There it was noted:

> While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring anyone who files [a] * * * complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint. [391 US 253, at 290.]

The Second Circuit had recited plaintiff's extensive depositions in that case and had observed:

> Despite these more than ample opportunities to develop a basis for his action, plaintiff has been unable to do so, and has failed to demonstrate the existence of any genuine issue of fact. [361 F2d 671, at 673 (2d Cir. 1966.)]

Petitioner argued on appeal and in his Petition here (Petition, at pp. 10-13) that because Judge Churchill's Memorandum Opinion did not specifically refer to each claim in plaintiff's Complaint, said Opinion should operate only as a partial summary judgment under F.R.Civ.P. 56(d). Petitioner, however, overlooks F.R.Civ.P. 52, which exempts decisions on motions brought under Rules 12 and 56 (as this motion was) from the general requirement that the Court file findings of fact and conclusions of law supporting its decisions. The Court's silence simply means that dismissal on the pleadings and/or summary judgment was granted as to plaintiff's entire claim, as moved by defendants.

Nor was the trial court's insistence (513a, 521a) that the parties guide him by means of supplemental briefs to the facts they considered important in any way an abuse of discretion. The fact that plaintiff chose to gamble that defendants would not carry their burden of showing no material issues of fact does not now give him cause to complain that the trial court found defendants' summary of the facts useful:

> Clearly the opposing party is subject to considerable risk, and justifiably so, in the * * * situation where he has made no attempt to avail himself of [further discovery pursuant to] Rule 56 (f) and on the papers before the court the moving party is entitled to summary judgment. Certainly the opposing party cannot hold back his evidence until trial. [6 Moore's Federal Practice ¶ 56.15 (6), at p. 56-605.]

As observed in *Interstate Circuit, Inc.* v. *United States,* 306 US 208, 226 (1939):

> The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. * * * Silence then becomes evidence of the most convincing character.

II. DEFENDANTS PRESENTED AMPLE EVIDENCE THAT THEY DID NOT ACT ARBITRARILY OR CAPRICIOUSLY IN DISMISSING PLAINTIFF FROM THE UNIVERSITY OF MICHIGAN DENTAL SCHOOL.

Dean Doerr testified that a dentistry student was required to pass all of his clinical courses in order to graduate with the DDS degree. (248a-249a) Like medical school graduates, dental school graduates are certified by their graduating institutions as being ready to treat patients. Therefore, if they are to receive licenses to do so, they must pass all clinical courses. This is because patients are treated in the clinical courses and if the student cannot successfully treat a patient in a course, he or she cannot successfully treat a patient in the outside world. (Testimony of Dean Doerr, 248a-250a)

It is uncontradicted that the plaintiff was on probation in his third year when he failed both Periodontics and Operative Dentistry, that he was dismissed and readmitted on strict probation and that he repeated both of those courses and failed them a second time. He was then dismissed once and for all and brought this lawsuit. As already noted above, he was unable to produce any documents to show that his repeated failure of these courses was based upon anything other than his own lack of ability. None of the conclusions contained in paragraph 15 of his Complaint were supported in the ensuing discovery. Rather, defendants produced a profusion of documents (535a-575a) to support their Answer to the plaintiff's Complaint and to affirmatively show that he was not dismissed in an arbitrary and capricious manner.

Those documents were made available to plaintiff on discovery and thirty of them were presented to the District

Court as exhibits when that court requested documentation on the due process issue. All of those documents are relevant, non-hearsay and admissible. Plaintiff's attorney had them while taking the depositions of the fourteen faculty members and administrators, yet plaintiff's attorney chose not to interrogate those witnesses on most of those documents. As noted by Professor Moore, a court may consider "other papers that have been identified by affidavit *or otherwise made admissible in evidence.*" 6 Moore's Federal Practice, ¶ 56.11 at p. 56-204. (Emphasis supplied.) *The admissibility of these thirty exhibits was never questioned* by plaintiff's counsel in the District Court. Both sides understood that they would be admissible at trial and usable on motion. Indeed, plaintiff's first attorney — who drafted the pleadings, conducted all discovery and briefed and argued the summary judgment motion — did the same thing himself and attached some of those documents to his own supplemental brief on the due process issue.[2] We respectfully submit that what plaintiff's fourth attorney now objects to was agreed upon by plaintiff's first attorney. In any event, the objection was neither timely made nor preserved for appeal.

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[2] Indeed, plaintiff *relies* on some of such documents in his petition filed in this Court. See, *e.g.*, plaintiff's Petition, at pp. 17-18.

III. THE ADMINISTRATIVE PROCEEDINGS FOLLOWED BY THE UNIVERSITY MET ALL APPLICABLE DUE PROCESS REQUIREMENTS ESTABLISHED BY THE SUPREME COURT'S DECISION IN BOARD OF CURATORS v. HOROWITZ.

What plaintiff really wants this Court to do is to regrade some of his examination papers written while a student at the University of Michigan Dental School. Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment was accompanied by an Affidavit signed by the plaintiff, to which plaintiff had attached (a) a copy of his examination, (b) a copy of his answer to the examination, and (c) a copy of a textbook used by the plaintiff. The plaintiff then asked the lower courts to compare the questions on the examination and the answers given with the textbook and regrade the plaintiff's examination. First of all, the grade given for the examination in question was never entered on plaintiff's transcript since the examination was given only for purposes of refreshing plaintiff's knowledge as to a particular procedure (see generally Kahler Deposition, 368a-391a) Second, and more important, no court should be asked to regrade a student. In his final reply brief filed in the District Court under date of February 9, 1979, plaintiff's attorney observed that "[i]t would be difficult, indeed, for any Court to become involved in a grading procedure from any school. However, * * * the Court must step in and the Court must protect the rights of that individual." Judge Churchill had earlier indicated, at the hearing of December 22, 1978, that he was not going to get involved in grading examination papers. (521a) Now, in this Court, plaintiff is once more asking a Court to regrade one of his examination papers. (See pp. 13, 18 of plaintiff's Petition where it is urged that plaintiff's examination papers should be compared with the language of the textbook.) Rather than review his examination papers, the Court should review the history of his matriculation at Michigan. (55a-56a, defendants' chart, *supra* at 6-18)

Plaintiff was accorded all the process which was due him and was given special opportunities not extended to every student. If *Board of Curators* v. *Horowitz,* 435 US 78, 98 S Ct. 948, 55 L.Ed. 2d 124 (1978), requires a hearing and an opportunity to rebut the charges prior to dismissal, Mr. Minye had *three* hearings, two of them concerning his failure of Periodontics and Operative Dentistry. *If* he was entitled to have yet another hearing following his failure of two courses for a second time while on strict probation, then it must be said that he had more than what was required in the way of a "hearing" during three full days of depositions where his attorney cross-examined each of his faculty members. This was far more than the "give-and-take" exchange required by *Greenhill* v. *Bailey,* 519 F 2d 5 (8th Cir. 1975), and it is unfortunate that educators had to be exposed to this process at all.[3]

The condition of strict probation, under which Mr. Minye was readmitted on May 2, 1977, did not carry with it the obligation or agreement to give him a fourth hearing. That is why Dean Doerr was so careful to explain to Mr. Minye that if he failed his courses a second time he would be dismissed without recourse. (529a).

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[3] Petitioner's assertion that the defendants went out of their way to stigmatize him, thus giving him more rights under *Greenhill,* is unfounded. The letter cited (Petition, pp. 20-21) was written at the request of plaintiff and is an obvious attempt to assist his admission to another school. It cannot be fairly read as a confession of discriminatory treatment, though its bureaucratese may be imprecise. (39a)

Thus, when the Executive Committee was polled by Dean Doerr by telephone on August 23 and 24, 1977, they were not being polled to arrive at a new decision; rather, they were being asked whether they wished to *reaffirm* their old decision — which was carefully made after a face-to-face meeting with Mr. Minye — *i.e.,* did they want to reaffirm his dismissal from the Dental School based upon his failure of two clinical courses taken a second time. (219a) As testified by Dean Doerr:

> A. [By Dean Doerr]: * * * I think to put that in proper context, that was not a vote for dismissal. It was a cooperative polling of the executive committee to see whether or not they wished to affirm a previous decision.
>
> Their previous decision being when he was readmitted, Mr. Minye was readmitted on probation and it was stated that he must receive passing grades or he would be dismissed. When the failing grades were posted, the poll that Dean Mann then conducted was simply to determine whether or not they wished to affirm or reaffirm that previous action or whether they wished to reconsider the situation. [218a-219a]

This point is important. The initial decision was made "after lengthy discussion" and after Mr. Minye's personal appearance before the Executive Committee. (559a) The decision was to give Mr. Minye another chance to pass the two failed courses. *The giving of another chance did not include the giving of another hearing before the Executive Committee.* Three hearings were two too many.

CONCLUSION

Thus the trial court did not depart from the accepted and usual course of judicial proceedings (S. Ct. Rule 19) either by receiving defendants' evidence (Part II, supra) or by asking all parties to provide him with evidence in an accessible form (Part I, supra), or by ruling in spite of plaintiff's choice or inability to provide him with such evidence (Part I, supra). Further, the trial court properly applied this Court's *Horowitz* decision, (Part III, supra) and thus did not come into conflict with this Court's decisions (S. Ct. Rule 19).

RELIEF SOUGHT

Respondents pray that the Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit be DENIED.

Respectfully submitted,

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